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No. 94-

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED TECHNOLOGIES CORPORATION AND
BASF CORPORATION,
Petitioners,

v.

BROWNING-FERRIS INDUSTRIES, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether private parties are precluded from bringing an action to recover their "necessary costs of response" (*i.e.*, cleanup costs) under Section 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(4)(B), if they are deemed to be potentially responsible parties ("PRPs") and, thus, potentially liable for some portion of the cleanup costs at the site.

2. Whether the three-year statute of limitations of CERCLA Section 113(g)(3), 42 U.S.C. § 9613(g)(3), which applies only to the specific contribution claims enumerated therein, should also apply to *all* response cost recovery claims brought by a PRP, even though a separate six-year limitations period for such claims is provided under CERCLA Section 113(g)(2), 42 U.S.C. § 9613(g)(2).

LIST OF INTERESTED PARTIES

The Petitioners are United Technologies Corporation and BASF Corporation.

The Respondents are Browning-Ferris Industries, Inc., Carleton Woolen Mills, Inc., Central Maine Power Company, Community Service Telephone Company, and Progressive Iron Works, Inc.

STATEMENT UNDER RULE 29.1

In accordance with Rule 29.1 of the Rules of this Court, petitioner United Technologies Corporation states that it is not a subsidiary of a publicly-held corporation and the shares of its U.S. subsidiaries are not publicly held. Petitioner BASF Corporation states that it is not a subsidiary of a publicly-held corporation and it has no subsidiaries with publicly-held stock.

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PETITION FOR A WRIT OF CERTIORARI

United Technologies Corporation and BASF Corporation, by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the two-judge panel of the court of appeals (App. 1a-22a) is reported at 33 F.3d 96. The opinion of the district court (App. 23a-25a) and a report and recommendation of a magistrate judge of that court (App. 26a-33a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1994. A petition for rehearing was denied on September 19, 1994. App. 35a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The principal relevant provisions of CERCLA, Sections 107(a) and 113(f) and (g), codified at 42 U.S.C. §§ 9607(a) and 9613(f) and (g), are reproduced as an appendix to the court of appeals opinion. App. 17a-22a. Other relevant provisions, Sections 107(b), (c), and (e) and 122(d), (g), and (h) of CERCLA, 42 U.S.C. §§ 9607(b), (c), and (e) and 9622(d), (g), and (h), are reproduced in Appendix F. App. 36a-44a.

STATEMENT OF THE CASE

A. Factual Background

Petitioners are engaged in an ongoing environmental cleanup of the Winthrop Landfill Superfund Site (the "Site"), a former municipal landfill near Winthrop, Maine. The landfill opened in or about 1930 and continued in operation until the early 1980s. Petitioners brought this action to recover part of their cleanup costs from respondents, who either arranged for disposal of their own wastes at the Site or transported the wastes of others to the Site.

In 1981, following the enactment of CERCLA, the Environmental Protection Agency ("EPA") placed the Site on its National Priorities List of most contaminated sites. EPA also identified Inmont Corporation ("Inmont"), the town of Winthrop, and two individuals as potentially responsible parties ("PRPs") for the contamination at the Site. In November 1985, Inmont and the other alleged PRPs entered into a settlement with the United States and the State of Maine. Inmont agreed to reimburse the governments $475,000 for the costs they incurred at the Site and for damage to natural resources. Inmont also agreed to address the contamination at the Site.

To allow for judicial enforcement, the governments each filed complaints in the district court against the set-

tling parties in January 1986 and submitted the settlement to the court in the form of a consent decree. The decree explicitly provided that "[b]y entering into this Consent Decree, the Settling Parties do not admit the validity of any claim asserted in the complaint or any liability arising under federal or state law from conditions at, by or around the landfill." J.A. A-52.[1] The district court entered the consent decree in March 1986.

Petitioners have worked together to fulfill Inmont's obligations under the consent decree.[2] Pursuant to the decree, petitioners initially restricted public exposure to contamination at the Site and conducted studies, focusing primarily on groundwater, to determine the extent of the contamination and the risks to human health and the environment. As a result of these studies, EPA determined, in March 1993, that groundwater treatment was necessary. Petitioners have since taken steps to implement that remedy. Remedial measures are still ongoing, but the cost is expected eventually to total between thirty and forty million dollars.

B. Proceedings in the District Court

Petitioners filed this action on October 16, 1992, to recover past and future "response" costs at the Site.[3] They asserted claims under CERCLA Sections 107(a)

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[1] "J.A." refers to the parties' joint appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

[2] Following the closure of its Winthrop plant, Inmont was acquired by petitioner United Technologies Corporation and was later sold to petitioner BASF Corporation.

[3] "Response" is defined by CERCLA to include both "removal" and "remedial" actions. 42 U.S.C. § 9601(25). "Removal" includes action to "monitor, assess, and evaluate" contamination and action to "prevent, minimize, or mitigate damage." 42 U.S.C. § 9601(23). "Remedial action" includes "actions consistent with permanent remedy" such as "cleanup of released hazardous substances." 42 U.S.C. § 9601(24).

and 113(g)(2). Section 107(a) provides that parties responsible for contamination "shall be liable for . . . all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe . . . [and] any other necessary costs of response incurred by *any other person* consistent with the national contingency plan . . . ." 42 U.S.C. § 9607(a)(4)(A), (B) (emphasis added). Section 113(g)(2) provides for a declaration of liability for future response costs in remedying contamination. 42 U.S.C. § 9613(g)(2).[4] Jurisdiction for the CERCLA claims was based on 42 U.S.C. § 9613(b) and 28 U.S.C § 1331; jurisdiction for two pendent state claims was based on 28 U.S.C. § 1367.

Respondents moved for summary judgment on the ground that all of petitioners' CERCLA claims, including the claim for recovery of response costs under Section 107(a), were claims for contribution, and that all claims for contribution under CERCLA are governed by CERCLA's three-year limitations period under Section 113(g)(3). 42 U.S.C. § 9613(g)(3). Respondents argued that, because petitioners are PRPs, their claims to recover cleanup costs are limited to claims for contribution under Section 113(f)(1), and that, therefore, those claims had to have been filed no later than three years after entry of the consent decree.

In opposing respondents' summary judgment motions, petitioners pointed out that the plain language of CERCLA Section 107(a) authorizes actions for recovery of response costs, not solely by the governments, but also by "any other person," a term that includes petitioners, as defined in CERCLA Section 101(21). 42 U.S.C. §§ 9607(a), 9601(21). Petitioners' claims for recovery of their

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[4] To recover part of the $475,000 settlement with the government, petitioners also made a claim for contribution under CERCLA Section 113(f)(1), which authorizes "[a]ny person [to] seek contribution from any other person who is liable or potentially liable under section [107(a)]." 42 U.S.C. § 9613(f)(1). That claim was later dismissed and is not at issue here.

cleanup costs were therefore timely because CERCLA Section 113(g)(2) provides a six-year period to bring actions "for recovery of the costs referred to in section [107]." 42 U.S.C. § 9613(g)(2).

The summary judgment motions were assigned to a magistrate judge for preparation of a report and recommendation. He determined that Section 107(a) is available only to the government and, perhaps, to private parties who voluntarily clean up a contaminated site "without waiting for the Government to spur them into action." App. 31a. The magistrate judge found that, because Inmont had agreed to a consent decree, the cleanup by petitioners was not voluntary. Thus, their "sole recourse . . . was to bring an action under Section 113(g) [*sic*] for contribution from other potentially liable parties." App. 32a. Taking for granted that a three-year limitations period automatically applies to all claims for "contribution," the magistrate judge ruled that petitioners' CERCLA claims, having been filed more than three years after the consent decree, are time-barred. App. 32a.

Petitioners objected to the magistrate judge's report and recommendation. Petitioners argued that the choice between the two statutes of limitations does not depend on why the party is conducting a cleanup, but on the nature of the relief being sought. Through its explicit reference to Section 107, Section 113(g)(2) applies to recovery of "response" costs being "incurred" by the claimant in performing a cleanup, while Section 113(g)(3) applies to actions for contribution for costs liquidated and paid to the prevailing party under a judgment or settlement. Petitioners observed that, by its express terms, the three-year period provided in Section 113(g)(3) applies only "with respect to such costs." 42 U.S.C. § 9613(g)(3). As a result, only petitioners' contribution claim for the $475,000 settlement with the government was governed by the three-year limitations period of Section 113(g)(3). *See* note 4 *supra*. Petitioners' remaining claims, those for recovery

of response costs that petitioners themselves incurred in performing the cleanup, are governed by the six-year limitations period of Section 113(g)(2). 42 U.S.C. § 9613(g)(2).

Without discussing CERCLA's two limitations provisions, the district court, pausing only to correct several errors in the report of the magistrate judge, adhered to the magistrate's recommendation and dismissed petitioners' CERCLA claims on the ground that they are time-barred. App. 24a-25a.

C. Proceedings in the Court of Appeals

On appeal, petitioners challenged the district court's holding that a Section 107(a) action cannot be maintained by a private party that was "spurred" by the government into conducting a cleanup. Petitioners stressed that the plain language of Section 107(a) contains no such restriction. Petitioners also argued that, in any event, regardless of how their action might be characterized, the three-year limitations period prescribed by Section 113(g)(3) does not apply, because the language of that provision does not include this kind of lawsuit.

The court of appeals nevertheless affirmed.[5] The court acknowledged at the outset that CERCLA provides two causes of action for private parties—cost recovery actions under Section 107(a) and contribution actions under Section 113(f). App. 4a. The court assumed, without discussion, that each right of action has its own separate statute of limitations: Section 113(g)(2) for actions to recover response costs under Section 107(a), and Section 113(g)(3) for contribution actions. App. 4a. Thus, in the court's view, once an action is classified as either

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[5] The appeal was decided by a two-judge panel. Then Chief Judge Breyer heard oral argument on the appeal. Following his nomination to this Court, he did not participate in the decision or the opinion of the panel. App. 1a n.*.

"cost recovery" or "contribution," the applicable statute of limitations inevitably follows.

"Contribution," according to the court, is "a claim 'by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.'" App. 6a (citation omitted). "Innocent parties," on the other hand, are entitled to an "action for recovery of costs" under Section 107(a). App. 8a. Applying this scheme to the facts of this case, the court concluded that petitioners' action "must be classified as an action for contribution." App. 10a.

The court of appeals did not endorse the district court's reasoning that the availability to a PRP of a cost recovery action under Section 107(a) depends on whether the PRP was "spurred" into action by the government. Acknowledging that the rationale of the district court was "problematic" (App. 16a n.13), the court affirmed on the alternative ground that Section 107(a) actions may be brought only "by innocent parties that have undertaken cleanups (say, the federal, state, or local government)." App. 7a. The court did not mention that federal, state, and local governments and their agencies are themselves frequently PRPs and that their right to sue under Section 107(a) does not depend on any showing of "innocence." *See, e.g., United States v. Kramer*, 757 F. Supp. 397, 414 (D.N.J. 1991) (holding that the federal government's potential liability as a PRP does not affect its Section 107(a) response cost recovery action); *United States v. Western Processing Co.*, 734 F. Supp. 930, 939-40 (W.D. Wash. 1990) (same). Notwithstanding its apparent rejection of the district court's rationale, the court of appeals also stated, in dictum earlier in its opinion, that it still might be "possible" for a PRP to recover cleanup costs under an *implied* right of action, if the cleanup was undertaken "spontaneously" and "without governmental prodding." App. 7a n.8.[6]

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[6] As the statutory basis for this potential implied right, the court cited CERCLA Section 107(c), 42 U.S.C. § 9607(c), not Section

In addition, the court made a variety of gratuitous erroneous statements, not supported by the record and not advocated in any of the parties' submissions. First, the court proclaimed that petitioners "are by their own admission liable parties" under CERCLA. App. 10a. Petitioners never made such an admission. As the consent decree signed by Inmont makes explicit, "the Settling Parties do not admit . . . any liability arising under federal or state law . . . ." J.A. A-52. Moreover, CERCLA itself admonishes courts that consent decrees for cleanups "shall not be considered an admission of liability for any purpose . . . ." 42 U.S.C. § 9622(d)(1)(B). To the extent the court of appeals' ruling rests on a contrary view, it is necessarily in error.

Second, the court made the uninvited pronouncement that, if petitioners' claim were governed by Section 113(g)(2), the accrual date of that claim would be March 1986. App. 4a. The accrual date under the six-year limitations provision was never raised or argued by any party, either in the court of appeals or in the district court, because respondents never contended that petitioners' claims, filed in October 1992, were untimely under the six-year limitations statute for actions seeking recovery of response costs. Nothing in the record supports the notion that construction of the "remedial action" under CERCLA began in March 1986. The court did not identify any basis for its statement.

107(a). The court did not explain how Section 107(c), which deals entirely with unrelated subjects—punitive damages liability to the United States in certain circumstances, and determinations of the amount of liability for owners or operators of motor vehicles, aircraft, and certain vessels (*see* App. 36a-38a)—could form the basis of such an implied right, particularly when, in the court's view, the express language of Section 107(a) was insufficient to the task. Of course, the reference to Section 107(c) could have been a typographical error, intended instead to refer to Section 107(a), but, if that is so, it merely begs the question of where in Section 107(a) the "without governmental prodding" limitation is to be found.

Petitioners sought rehearing and suggested rehearing en banc. They argued that the panel's decision was inconsistent with this Court's decision in *Key Tronic Corp. v. United States*, 114 S. Ct. 1960 (1994), which was issued after oral argument. In addition, petitioners reminded the court of their alternative ground for reversal, which the panel's opinion failed to address or even mention: the express language of Section 113(g)(3), the three-year limitations provision on which respondents rely, does not cover this action, because by its terms it applies only "with respect to" costs paid to a party in whose favor a judgment or settlement has been entered.

The court denied the petition for rehearing. App. 35a. A few days before that denial, the clerk issued an errata sheet, correcting several errors and changing the accrual date for petitioners' action under Section 113(g)(2) to "no later than early 1987," on the ground that "remedial construction *apparently* started . . . within one year of [March 1986]." App. 34a (emphasis added). The errata sheet provided no explanation or citation for this alternative declaration, and it too finds no support in the record.

REASONS FOR GRANTING THE PETITION

This case presents significant issues that, if not reviewed by this Court, will dramatically and negatively affect the statutory scheme Congress enacted to clean up hazardous waste sites. The decision of the court of appeals conflicts with that statutory scheme and with decisions of this Court and other courts. The petition should be granted to resolve issues that threaten to hinder the very environmental goals that CERCLA was intended to achieve.

The court of appeals made two fundamental errors. First, the court determined that PRPs have no rights to recover response costs under Section 107(a) of CERCLA. The court interpreted CERCLA to limit PRPs to contribution relief under Section 113(f)(1). But that ruling is flatly contradicted by the plain language of Section

107(a) and by the decision of this Court last term in *Key Tronic Corp. v. United States,* 114 S. Ct. 1960 (1994). In that case, both the majority and dissent found that a PRP could recover response costs under Section 107(a); the only disagreement on this score was whether the right is implied or express. The court of appeals departed substantially from *Key Tronic* when it denied a Section 107(a) remedy to petitioners on the ground that they are alleged to be PRPs.

In addition, the court of appeals misapplied the two separate statute of limitations provisions of CERCLA. The court assumed, without justification, that all contribution actions are subject to the three-year limitations period of Section 113(g)(3), and that the six-year period for response cost actions in Section 113(g)(2) is limited to claims by "innocent" parties under Section 107(a). That assumption does not square with the plain language of the statutory provisions in question.

Rather, when Congress added the statute of limitation provisions to CERCLA in 1986 (six years after CERCLA was enacted), Congress made clear that Section 113(g)(2) was to govern *any* initial or subsequent action for the recovery of response costs under Section 107(a). Congress did *not* say that any cost recovery action by a PRP that has entered into a consent decree should be classified as an action for contribution, and, even if a contribution label is applied to such actions, Congress did *not* provide that any action for contribution is governed by the three-year limitations period in Section 113(g)(3). All of the actions covered by Section 113(g)(3) are actions for contribution, but the statute does not say that all actions for contribution are covered by Section 113(g)(3). Section 113(g)(3) applies only to the specific kinds of actions enumerated therein, and Section 113(g)(2) applies more generally to any cost recovery action under Section 107(a). This is in keeping with the overall statutory scheme, which specifies that the actions described in Section 107(a) are authorized "[n]ot-

withstanding any other provision or rule of law . . . ." As discussed in more detail below, recent congressional deliberations confirm that Congress intended to apply a six-year limitations period to actions brought by PRPs to recover costs that they themselves incurred in conducting a cleanup, whatever such actions may be called.

Moreover, aside from flying in the face of congressional intent, the court of appeals' decision will have far-reaching implications for the pace and financial burden of cleanups at numerous hazardous waste sites. One of the primary goals of CERCLA is to encourage private parties to assume responsibility for cleanup activities. By prohibiting PRPs from pursuing cost recovery under Section 107(a), and relegating them instead to a contribution action under Section 113(f), the appellate court's decision creates a disincentive for PRPs to clean up sites. The result will be a greater demand on public funds to carry out cleanup actions and increased litigation on peripheral matters, such as statute of limitations questions.

Because of their potentially severe consequences in cutting off meritorious claims, statutes of limitation should be unambiguous and easily understood. CERCLA's two limitations provisions, however, are shrouded in uncertainty and confusion, both among PRPs and in the courts. Likewise in an unsettled state are the rights that Congress granted under Section 107(a) to PRPs that have agreed to perform cleanups.

For these reasons, which are explained more fully below, this Court should grant the petition and give much needed guidance to the courts as well as to the many thousands of PRPs whose rights are now in limbo.

I. BY DISCOURAGING PRPs FROM CONDUCTING CLEANUPS, THE COURT OF APPEALS DECISION WILL FRUSTRATE THE INTENT OF CONGRESS.

The decision of the court of appeals dramatically alters the rights of every PRP conducting a cleanup of a contaminated site. PRPs entered more than 2,000 settlements with EPA from 1980 through 1993. These PRPs alone have undertaken and continue to be responsible for cleanup services valued at more than eight billion dollars.[7] In addition, PRPs at numerous other sites are performing cleanups under the supervision of state regulatory agencies or without having entered into a formal settlement agreement. Many other PRPs will soon face the decision whether or not to agree to clean up contaminated sites. The rights of all of these PRPs to recover their response costs, and the ground rules affecting those rights, are at stake in this case.

The cleanup work being conducted by private parties is in large part a product of the statutory right to recover response costs under Section 107(a) from other responsible parties. Incentives to private cleanup are crucial to the Superfund program because the government fund is inadequate to cover the initial costs of cleanup of many sites. EPA estimates that in 1993 alone, settling PRPs initiated nearly 80 percent of the long-term cleanups at sites listed on the National Priorities List of contaminated sites. GAO Report at 4. Section 107(a) cost recovery is the primary incentive provided in the Superfund program to facilitate EPA's task of convincing PRPs to conduct cleanups themselves rather than waiting to be sued later for the costs of cleanup performed by others. The decision of the court of appeals removes this incentive, substitutes a less effective contribution action with a shorter statute of limitations, and thus

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[7] United States General Accounting Office, *Superfund—EPA Has Opportunities to Increase Recoveries of Costs*, GAO/RCED-94-196 (September 1994) ("GAO Report") at 18.

necessarily diminishes the willingness of PRPs to settle with the government and conduct a cleanup.

A cost recovery action under Section 107(a) provides several advantages for a PRP that has agreed to conduct a cleanup. First, defendant PRPs in such an action are subject to strict liability. Second, the liability of defendant PRPs, once established, is joint and several, thus providing the party conducting the cleanup with increased prospects for actual recovery and protection against the risk that some PRPs will be insolvent or unknown. Third, the defenses that may be asserted in a Section 107(a) action are limited to those expressly enumerated in Section 107(b). If left undisturbed, the decision of the court of appeals will deny these advantages to PRPs that agree to conduct cleanups and will thus create incentives, contrary to the intent of Congress, for PRPs to resist settling with EPA and to resist undertaking cleanups. The strong message will be that private parties who come forward, enter settlements, clean up sites, and seek to recover their costs from PRPs that were unwilling to share responsibility will receive no special benefit for their labors and costs. To the contrary, they will have much greater exposure and higher risk than PRPs that do nothing and wait to be sued. That is not what Congress intended. *Nurad, Inc. v. William E. Hooper & Sons*, 966 F.2d 837, 841 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 377 (1992) (private cost recovery under Section 107 is to encourage private cleanup) (citing 1980 House report).

The practical difficulties created by the denial of a right to recover response costs under Section 107(a) are compounded by widespread confusion in the federal courts following the amendments to CERCLA enacted in 1986 in the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). Pub. L. No. 99-499, 100 Stat. 1613 (1986). Three of the four principal CERCLA provisions at issue in this case, Section 113(f), (g)(2), and (g)(3), were added by SARA. The relevant portions of Section 107(a), the other provision construed by the

court of appeals, appeared in CERCLA as originally enacted in 1980 and were not changed by SARA. The confusion stems largely from the fact that SARA did not describe the relationship between the express right of action for contribution recognized in Section 113(f), the response cost recovery actions authorized in Section 107 (a), and the implied right of action for contribution that some courts had found in CERCLA before SARA's enactment. *E.g., Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985). *Accord, Key Tronic*, 114 S. Ct. at 1965.

Rather than removing any doubt about the legal rights of PRPs under CERCLA, SARA has in some respects made matters worse. The relevant case law has recently been reviewed at some length in *United States v. SCA Services of Indiana, Inc.*, 849 F. Supp. 1264 (N.D. Ill. 1994). Although the majority of courts have determined that PRPs conducting cleanups may recover their response costs under Section 107(a), a significant number of other courts have held that PRPs must look solely to Section 113(f)(1) for any recovery under CERCLA.[8] The court of appeals was aware that the law on this point

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[8] *Compare, e.g., Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524 (6th Cir. 1993); *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990); *United States v. SCA Services of Indiana, Inc.*, 849 F. Supp. 1264, 1283 (N.D. Ill. 1994); *Barton Solvents, Inc. v. Southwest Petro-Chem, Inc.*, 38 E.R.C. 1022, 1027 (D. Kan. 1993); *Charter Township of Oshtemo v. American Cyanamid Co., et al.*, No. 1:92:CV:843, 1993 U.S. Dist. LEXIS 13176 (W.D. Mich. Aug. 19, 1993); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1277 (E.D. Va. 1992); *United States v. Kramer*, 757 F. Supp. 397, 417 (D.N.J. 1991) (granting Section 107(a) relief to PRPs), *with, e.g., United States v. Colorado & Eastern Railroad Co.*, Nos. 93-1422, 94-1041, 1994 U.S. App. LEXIS 32675 (10th Cir. Nov. 17, 1994); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994); *Transtech Indus., Inc. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1086-87 (D.N.J. 1992); *Avnet v. Allied-Signal, Inc.*, 825 F. Supp. 1132, 1139 (D.R.I. 1992) (PRPs' remedy is limited to contribution).

is not settled and thus set out to "clarify the relationship between cost recovery actions and contribution actions" under CERCLA. App. 2a. The result of the court of appeals' effort, however, will be the opposite of the one intended. As explained in the following sections, the decision below conflicts not only with the decision of this Court in *Key Tronic* but also with the language of the statute itself.

Indeed, the evidence from recent congressional action on CERCLA amendments demonstrates convincingly that Congress always intended PRPs conducting cleanups to have the benefit of the six-year limitations period. As Superfund amendments and reauthorization worked their way through Congress during the 1994 session, the bills reported out of committees in both houses clarified the limitations provisions to remove any doubt that PRPs conducting cleanups may file suit within six years of construction of remedial actions, even if they are subject to a judgment or settlement.[9] These provisions were not controversial, and the bills were reported favorably by every committee to which they were referred,[10] but ultimately, as a result of political disputes unrelated to CER-

[9] H.R. Rep. No. 582, Part I, 103d Cong., 2d Sess. 184, 256-57 (1994); S. Rep. No. 349, 103d Cong., 2d Sess. 48, 204 (1994). Although this Court has warned of the hazards of using subsequent legislative materials to illuminate the meaning of statutory language adopted by an earlier Congress, *see, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-119 (1980), it is worth noting that Chairman Dingell and 18 other senior members of the House Committee on Energy and Commerce were also members of the Committee in 1986, when SARA was enacted. Likewise, Chairman Baucus and six other senior members of the Senate Committee on Environment and Public Works were members of that Committee when SARA was enacted.

[10] The bills were reported favorably by the House committees on energy and commerce, public works and transportation, and ways and means, and the Senate committees on environment and public works and finance. H.R. Rep. No. 582, Parts I, II, and III; S. Rep. No. 349.

CLA's statutes of limitations, the bills were not brought to a floor vote in either house before Congress adjourned for the recent elections. The political difficulties associated with enacting comprehensive amendments to a statute of CERCLA's significance emphasizes the need for definitive judicial interpretation of the statutory language that currently exists. Review by this Court is essential to clarify the rights of PRPs who clean up contaminated sites and to establish once and for all the applicable limitations periods for parties whose rights are being and will be adjudicated under the present version of CERCLA.

II. THE DENIAL OF A REMEDY UNDER SECTION 107 TO PRPs THAT UNDERTAKE RESPONSE ACTIONS IS CONTRARY TO THE STATUTE ITSELF, THIS COURT'S DECISION IN *KEY TRONIC*, AND DECISIONS OF OTHER COURTS.

The key to the court of appeals decision is the determination of whether petitioners' claim comes under Section 107(a) or Section 113(f). The court concluded that petitioners have no right of action under Section 107(a). Rather, as " 'non-innocent' part[ies]," petitioners' only recourse is to seek contribution under Section 113. App. 8a.

That holding is totally at odds with the remedial scheme explained in *Key Tronic*. In that case the plaintiff was a PRP that had incurred response costs of its own and that had also made a monetary payment to the government in settlement of proceedings initiated by EPA and a state counterpart. 114 S. Ct. at 1963.[11] Nonethe-

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[11] Unlike petitioners here, Key Tronic Corporation did not agree to assume principal responsibility for a cleanup. Nevertheless, Key Tronic was permitted to bring not only a contribution claim under Section 113(f) to recover part of the money it had paid to the government, but also a response cost recovery action under Section 107(a) to recover the costs that Key Tronic itself had incurred. Most of Key Tronic's direct response costs consisted of attorney's fees, and that is what gave rise to the issue that this Court decided in the case.

less, the Court decided that the PRP plaintiff, a "non-innocent party" in the parlance of the court of appeals, was entitled to recover response costs under "§ 107, which impliedly authorizes private parties to recover cleanup costs from *other* PRP's." *Id.* at 1967 (emphasis added). Regardless of whether respondents or the court of appeals might label such an action as one for "contribution," *Key Tronic* left no room for doubt about a PRP's right to recover necessary costs of response under Section 107(a).[12]

The court of appeals acknowledged that petitioners' action for recovery of cleanup costs would be timely if petitioners were entitled to seek relief under Section 107(a). App. 4a. Yet, despite this Court's unanimous view that PRPs are entitled to do just that, the court of appeals took a contrary position and, for that reason alone, found petitioners' claim to be subject to the limitations period of Section 113(g)(3). App. 15a-16a.

But that is not the only point on which the opinion of the court of appeals departs from *Key Tronic*. The court below also decided that, by recognizing an express right of contribution, the 1986 amendments to CERCLA revoked an implied right of action that courts had discerned under Section 107(a) before CERCLA was amended. The court reached this result despite the fact that, in amending CERCLA in 1986, Congress left untouched Section 107(a)'s opening phrase, which provides that the right of action created in that section applies "[n]otwithstanding any other provision or rule of law . . . ." Nevertheless the court of appeals concluded that the remedies available under Section 107 and Section 113 are "*distinct, non-overlapping* anodynes," and that therefore a claimant with a contribution remedy under Section 113 is ineligible

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[12] The dissent also found that Section 107(a) authorized recovery, taking issue only with the majority's characterization of a PRP's right as an "implied" rather than an express right of action. 114 S. Ct. at 1968.

for relief under Section 107. App. 15a-16a (emphasis added).

Key Tronic reached the opposite conclusion. "[T]he statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a *similar and somewhat overlapping* remedy in § 107." 114 S. Ct. at 1966 (emphasis added). Thus, the 1986 amendments explicitly provided in Section 113 for the availability of a contribution remedy, but they did not alter or nullify the right of action that remained available under Section 107(a). The court of appeals sidestepped the conflict in a footnote, maintaining that *Key Tronic* "expressed no views anent the relation between contribution and cost recovery actions." App. 16a n.12.

Furthermore, a prohibition against PRPs recovering response costs under Section 107(a) produces a result that cannot be reconciled with cases decided by the Third, Sixth, and Eighth Circuits. *E.g., AL Tech Specialty Steel Corp. v. Allegheny Int'l, Inc. (In re Allegheny Int'l, Inc.)*, 126 B.R. 919, 923 (W.D. Pa.), *aff'd without opinion*, 950 F.2d 721 (3d Cir. 1991) (Section 107(a) recovery awarded because "AL Tech does not seek to recover response costs owed to, or incurred by, the EPA, the DEC, or any other third party, but instead seeks to recover response costs it has directly incurred and will directly incur in the future"); *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991) (PRP entitled to Section 107(a) remedy despite prodding by threat of lawsuit); *Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524 529-30 (6th Cir. 1993) (PRP's Section 107(a) action timely under Section 113(g)(2)). *Accord, In re Charter Co.*, 862 F.2d 1500, 1503 (11th Cir. 1989) (bankruptcy claimants may recover under Section 107(a) for response costs incurred directly by them but not response costs incurred by third parties).

As mentioned above, the identity of the particular statutory provision or provisions that allow PRPs to recover

response costs is significant for several reasons, wholly apart from the limitations issue. There are substantial differences in the remedies afforded under Section 107(a) and Section 113(f) that make this issue especially important to petitioners and other PRPs that agree to perform cleanups.

For example, Section 107(a) imposes strict liability, and private claimants whose rights are derived from that section are entitled to joint and several liability against defendant PRPs; these are benefits not available to Section 113(f) contribution claimants. *Barton Solvents, Inc. v. Southwest Petro-Chem, Inc.*, 38 E.R.C. (BNA) 1022, 1027 (D. Kan. 1993); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1277 (E.D. Va. 1992). These distinctions alone can have an enormous impact on the amount plaintiffs can recover at sites where substantial contamination was caused by parties that are no longer solvent or PRPs whose identity cannot be determined (so-called "orphan shares"). *E.g., O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990) (contribution not a panacea because of difficulty in locating solvent PRPs); *Chesapeake & Potomac*, 814 F. Supp. at 1277-78.

Another practical consideration is that actions under Section 107(a) are subject to only the three defenses that are enumerated in Section 107(b). 42 U.S.C. § 9607(b). Under Section 113(f), however, contribution claimants are subject to equitable defenses and to causation-related defenses as well. *Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d at 530; *United States v. Kramer*, 757 F. Supp. 397, 427 (D.N.J. 1991).

Such considerations weigh heavily on PRPs that must decide whether to cooperate with the government and take the lead in conducting a cleanup or to sit on the sidelines and wait for the government or another PRP to do the work. Given the court of appeals' ruling, PRPs will likely conclude that, in view of the costs and risks associated with undertaking a cleanup, it is preferable to defend

against a contribution claim that might be brought in the future after a cleanup is well underway. By encouraging this kind of choice, the decision below undermines the enforcement scheme established by Congress in CERCLA, and jeopardizes future cleanup efforts.

III. APPLYING THE THREE-YEAR LIMITATIONS PERIOD TO PETITIONERS' COST RECOVERY CLAIMS IS NOT JUSTIFIED BY THE EXPRESS LANGUAGE OF SECTION 113(g)(3) OR BY CHARACTERIZING THIS CASE AS ONE FOR CONTRIBUTION.

As noted in the description of the court of appeals' opinion above (*see* pages 6, 9, *supra*), the court did not address the specific language of Section 113(g)(3). Respondents, however, contended below that the three-year statute of limitations applies because (a) petitioners' action is one for contribution and (b) the three-year period of Section 113(g)(3) applies to *all* contribution claims. Neither argument is faithful to the relevant statutory provisions.

Starting with the second prong of the argument, it would not follow that Section 113(g)(3) governs petitioners' action, even if one were to assume for the sake of argument that the claim for response costs is correctly styled a claim for "contribution." The court of appeals simply assumed, without explanation, that Section 113(g)(3) applies to all contribution actions under CERCLA. App. 4a. That assumption is not supported by a close reading of the CERCLA limitations provisions.

Section 113(g)(2) applies to "recovery of the costs referred to in Section [107]," *i.e.*, "necessary costs of response incurred by any other person." 42 U.S.C. §§ 9613(g)(2), 9607(a). Respondents do not dispute that petitioners' costs are precisely the kind of response costs "referred to in Section [107]."

In contrast, Section 113(g)(3) deals exclusively with actions seeking contribution for costs the claimant has been required to pay to another party, and makes no men-

tion of contribution for cleanup costs directly incurred by the claimant. In particular, Section 113(g)(3) covers only four situations: (1) a judgment in a cost recovery action, which could require only the payment of money to another party who has incurred cleanup costs; (2) *de minimis* settlements under Section 122(g), which allows cash-out settlement with the government for parties responsible for only minor contamination, 42 U.S.C. § 9622(g)(2); (3) cost recovery settlements under Section 122(h), which authorizes monetary settlement of claims for "costs incurred by the United States Government," *id.* § 9622(h)(1); and (4) a "judicially approved settlement *with respect to such costs or damages.*" *Id.* § 9613(g)(3) (emphasis added).

The court of appeals relied on the last item: a judicially approved settlement. App. 4a-5a. But the court did not give effect to all of the language of the statute. By its terms, the final phrase of Section 113(g)(3) addresses only the payments a contribution claimant makes to the party with whom it settles. This is clear from the statutory language emphasized above, which expressly limits the application of Section 113(g)(3)(B) to the particular response costs the claimant agreed to pay in the judicially approved settlement. Petitioners' $475,000 settlement with the government is the only cost that comes within the plain language of the statute.

Conspicuously missing from the kinds of claims enumerated in Section 113(g)(3) are claims arising from CERCLA's injunctive-type remedies. For example, Section 113(g)(3) does not cover costs incurred under a court-ordered cleanup under Section 106, an EPA administrative cleanup order under Section 106, or a settlement under Section 122(d) that, like the one at issue in this case, requires a private party to conduct a cleanup. The exclusion of contribution claims based on injunctive remedies cannot be an accident; Congress obviously intended Section 113(g)(3) to cover only contribution claims seeking the recovery of money paid to another, not claims

(even if properly denominated as claims for contribution) seeking recovery of cleanup costs that the claimant itself incurs over time pursuant to an order or settlement. Neither the court of appeals nor respondents offered any explanation of how the specific language of Section 113(g)(3) could be read to include petitioners' action for response costs. Indeed, at oral argument, then Chief Judge Breyer questioned respondents on this very point, with specific reference to the relevant statutory language, and respondents failed to explain how Section 113(g)(3) could possibly cover the disputed claims.

As the statutory language shows, the limitations period set out in Section 113(g)(3) is confined to certain specifically enumerated situations. These situations do not include actions by PRPs to recover cleanup costs that they incurred in response to cleanup orders from EPA or pursuant to an agreement, such as the one entered by Inmont, to clean up a Superfund site. This exclusion from the coverage of Section 113(g)(3) is particularly evident when PRPs are ordered by EPA under Section 106 to conduct the cleanup, because such orders cannot conceivably be deemed a "judicially approved settlement." Nor do they otherwise fit within any of the three other situations covered by Section 113(g)(3). Those claimants must be governed by the six-year period in Section 113(g)(2). Given the strong congressional desire to encourage PRPs to settle with EPA, it is inconceivable that Congress would subject parties who agree in settlements to conduct cleanups to a far shorter time bar than that available to parties who refuse to settle and are ordered to clean up.

The first prong of the court's decision—that petitioners' action is one for contribution—is also wrong, at least if the word "contribution" is used in the narrow sense employed in the 1986 amendments to CERCLA. The express right to "contribution" recognized in SARA was not needed to address petitioners' situation. PRPs that themselves have incurred response costs always have been en-

titled to sue for cost recovery under Section 107(a), since the original enactment of CERCLA in 1980. *See, e.g., Bulk Distribution Centers, Inc. v. Monsanto,* 589 F. Supp. 1437, 1443 (S.D. Fla. 1984) (private party entitled to recover response costs under Section 107(a), except where claim not ripe) (citing cases); *City of Philadelphia v. Stepan Chemical Co.,* 544 F. Supp. 1135, 1143 (E.D. Pa. 1982) (site owner can recover response costs under Section 107(a)).

Section 113(f) of SARA clarified the right to contribution of PRPs who had not themselves incurred response costs, but who were sued under Section 107(a) for response costs incurred by the government or someone else. Because CERCLA originally contained no express right of contribution, courts were faced with the question of whether parties that were not cleaning up a site, but were jointly and severally liable under Section 107(a), could obtain contribution for the amounts they were required to pay the government. Most courts found that cost recovery defendants could obtain contribution, because such a right was implied in the legislative history of CERCLA and in CERCLA Section 107(e)(2), which preserves causes of action available "by subrogation or otherwise." 42 U.S.C. § 9607(e)(2). *E.g., Wehner v. Syntex Agribusiness, Inc.,* 616 F. Supp. 27, 31 (E.D. Mo. 1985) (cross-claim for contribution for any amounts found to be due to plaintiff is implicitly recognized in Section 107(e)(2) and the legislative history of CERCLA); *United States v. South Carolina Recycling and Disposal,* 653 F. Supp. 984, 995 (D.S.C. 1984) (right of contribution implied from common law principles and Section 107(e)(2)).

By expressly recognizing a right to "contribution" in SARA, Congress thus confirmed the same contribution right that had previously existed only by implication. The focus was on claimants whose liability to others had been (or would be) liquidated and reduced to a sum certain

and who sought to recover part of that sum from other PRPs. But nothing in the language of Section 113(f), or in the jurisprudence that led to its adoption in SARA, remotely suggests that Congress intended to limit, much less revoke, rights it had originally granted in Section 107(a) to parties undertaking response actions at a site. Petitioners' right to sue for cost recovery under Section 107(a) thus remained intact even after SARA's express inclusion of a contribution remedy.

For all these reasons, whether the decision below is measured against the express language of the statute, the underlying purposes of CERCLA, this Court's decision in *Key Tronic*, decisions of other federal courts, or the practical imperatives of CERCLA enforcement, the court of appeals' ruling is a serious departure from governing authority and threatens to hamper achievement of the very environment goals that CERCLA was designed to promote. Review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 19, 1994

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2253

UNITED TECHNOLOGIES CORPORATION, *et al.*,
Plaintiffs, Appellants,

v.

BROWNING-FERRIS INDUSTRIES, INC., *et al.*,
Defendants, Appellees.

Appeal from the United States District Court
for the District of Maine

[Hon. Morton A. Brody, *U.S. District Judge*]

Before

Breyer,* *Chief Judge*,

Torruella and Selya, *Circuit Judges.*

August 19, 1994

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* Chief Judge Stephen Breyer heard oral argument in this matter but did not participate in the drafting or the issuance of the panel's opinion. The remaining two panelists therefore issue this opinion pursuant to 28 U.S.C. § 46(d).

SELYA, *Circuit Judge*. This appeal demands that we clarify the relationship between cost recovery actions and contribution actions under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1987), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 101 *et seq.*, 100 Stat. 1613 (1986). Having completed our task, we affirm the district court's entry of summary judgment terminating appellants' action as time-barred.

I. BACKGROUND

The essential facts are not in dispute. In 1981, after discovering hazardous substance contaminants at a landfill in Winthrop, Maine (the Site), the United States Environmental Protection Agency (EPA) placed the Site on its national priority list. The EPA and Maine thereafter undertook a concurrent investigation and determined that Inmont Corporation, since acquired by plaintiff-appellant United Technologies Corporation (UTC),[1] had conducted contamination producing activities at the Site from 1950 to 1975.

In 1982, the EPA notified Inmont that it was liable, under CERCLA, to clean up the Site. Several years of dilly-dallying eventually gave way to negotiations among Inmont and certain other potentially responsible parties (PRPs),[2] on one hand, and the appropriate federal and state officials, on the second hand. The parties reached a tentative agreement and prepared a consent decree. On January 29, 1986, the United States filed a civil action against Inmont and others under CERCLA, with a view toward securing a judicial imprimatur on the proposed

[1] UTC acquired Inmont in 1979 and transferred its ownership to BASF Corporation (a UTC subsidiary) in 1985. Inmont then merged into BASF. UTC and BASF brought this suit jointly, and both appear here as appellants.

[2] The other PRPs were the Town of Winthrop, Everett Savage, and Glenda Savage. None of them are involved in this appeal.

decree. The suit alleged that the named defendants were jointly and severally liable for the costs the United States had incurred, and would continue to absorb, in responding to releases and threatened releases at the Site.

The district court promptly consolidated EPA's case with a nearly identical case that Maine had filed against the same defendants; and, on March 23, 1986, the court entered the consent decree. Pursuant thereto, appellants agreed to undertake and complete corrective work at the Site in accordance with a plan for remedial action. The cleanup proved to be expensive: appellants make the uncontradicted claim that remedial work cost in excess of $13,000,000 to date, and that work yet to be done likely will absorb an additional $20,000,000 or more. Appellants also agreed to reimburse, and have since paid, the federal and state sovereigns $475,000 for costs previously incurred with respect to scouring the Site.

On October 16, 1992, appellants brought suit in federal district court against several defendants, including Browning-Ferris Industries, Inc. (Browning).[3] In their complaint, appellants posited claims under both federal and state law. They alleged that the defendants were wholly or partially responsible for contamination of the Site and sought three separate kinds of relief, namely, (1) recovery of cleanup costs paid directly by them (hereinafter "first-instance costs"); (2) recovery of monies paid by them to reimburse the EPA and Maine for cleanup costs (hereinafter "reimbursed costs"); and (3) a declaration of rights in respect to liability for future response costs.

Browning moved for summary judgment, hypothesizing that CERCLA's statute of limitations barred appellants'

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[3] The other named defendants included Carleton Woolen Mills, Inc., Central Maine Power Company, Community Service Telephone Co., Progressive Iron Works, Inc., and Quaker Lace Company. Early in the proceedings, appellants voluntarily dismissed their action against Quaker Lace. The remaining defendants appear here as appellees.

federal claims, and that the pendent state claims should, therefore, be dismissed for lack of jurisdiction, *see, e.g., Brennan* v. *Hendrigan*, 888 F.2d 189, 196 (1st Cir. 1989) (explaining that pretrial termination of federal-law claims forces dismissal of pendent state-law claims in the absence of any other cognizable basis for federal jurisdiction). Appellants voluntarily dismissed their claims regarding the reimbursed costs (apparently believing such claims to constitute time-barred contribution claims), but otherwise opposed the motion. A magistrate judge recommended granting *brevis* disposition with respect to appellants' remaining claims. The district court agreed. *See* 1993 WL 66007 (D. Me. May 27, 1993). This appeal followed.[4]

II. ANALYSIS

CERCLA and SARA together create two different kinds of legal actions by which parties can recoup some or all of the costs associated with cleanups: cost recovery actions, *see* 42 U.S.C. § 9607(a), and contribution actions, *see id.* § 9613(f)(1). Cost recovery actions are subject to a six-year statute of limitations, *see id.* § 9613(g)(2), while contribution actions must be brought within half that time, *see id.* § 9613(g)(3).[5]

In this case appellants' cause of action, no matter how it is visualized, accrued in March, 1986. *Compare id.* § 9613(g)(2)(B) (providing that the trigger date for a cost recovery action is fixed by the "initiation of physical on-site construction of the remedial action") with *id.* § 9613(g)(3)(B) (providing that the accrual period for

[4] When Browning sought summary judgment, all the remaining defendants followed suit. They ultimately achieved an identical result. This proceeding embraces the district court's grant of summary judgment in favor of all defendants. For ease in reference we treat the appeal as if Browning alone were the appellee, but our resolution of it applies with full force to all the other appellees.

[5] We set out the text of the centrally relevant statutes, 42 U.S.C. §§ 9607(a), 9613(f) & 9613(g), in an appendix hereto.

contribution actions begins when a "judicially approved settlement" is entered). Here, remedial construction started at the Site in the same month that the court entered the consent decree, namely, March of 1986. Appellants brought suit roughly five and one-half years thereafter. Thus, the sole question presented on appeal is whether appellants' action is an action for cost recovery or one for contribution. If appellants' action qualifies under the former rubric, it is timely; but, if it is properly classified under the latter rubric, it comes too late.

Because the issue on appeal turns on the correct interpretation of the relevant statutory provisions, we exercise *de novo* review. *See United States* v. *Gifford*, 17 F.3d 462, 472 (1st Cir. 1994) (holding that questions of law engender plenary appellate review); *Liberty Mut. Ins. Co.* v. *Commercial Union Ins. Co.*, 978 F.2d 750, 757 (1st Cir. 1992) (same).

A. *The Contours of Contribution.*

Four portions of the statute are of immediately obvious relevance. The only one of the four found in the original CERCLA legislation is 42 U.S.C. § 9607(a)(4). This proviso makes enumerated parties "liable for . . . all costs of removal or remedial action incurred by [government entities and] any other necessary costs of response incurred by any other person consistent with the national contingency plan." The other three provisions originated in SARA and are all codified within 42 U.S.C. § 9613. Under 42 U.S.C. § 9613(f)(1), "[a]ny person may seek contribution from any other person who is liable or potentially liable" for response costs. The same section contains two statutes of limitations. One provides that an action for cost recovery must be commenced within six years of the accrual date.[6] *Id.* § 9613(g)(2). The other provides that "[n]o action for contribution for any response

[6] This subsection speaks in terms "of the costs referred to in [section 9607]." 42 U.S.C. § 9613(g)(2).

costs or damages may be commenced more than 3 years after . . . the date of . . . entry of a judicially approved settlement with respect to such costs or damages." *Id.* § 9613(g)(3).

It is apodictic that our first recourse must be to the statute's text and structure. *See United States* v. *O'Neil,* 11 F.3d 292, 295 (1st Cir. 1993); *United States* v. *Charles George Trucking Co.,* 823 F.2d 685, 688 (1st Cir. 1987). Following this path, it is evident that CERCLA differentiates between "action[s] for recovery of . . . costs" and "action[s] for contribution." *Compare* 42 U.S.C. § 9613(g)(2) *with id.* § 9613(g)(3). Although Congress did not explicitly plot the boundary that divides these two types of actions, we are not wholly without guidance. Under accepted canons of construction, legal terms used in framing a statute are ordinarily presumed to have been intended to convey their customary legal meaning. *See Bradley* v. *United States,* 410 U.S. 605, 609 (1973) (holding that "the law uses familiar legal expressions in their familiar legal sense") (citation omitted); *MCA, Inc.* v. *Wilson,* 677 F.2d 180, 186 (2d Cir. 1981) (similar); *see also* 2A Norman J. Singer, *Sutherland Stat. Const.* § 47.30, at 262 (5th ed. 1992). This precept has special force when, as now, there is no persuasive evidence that Congress aspired to use a particular legal term in some unusual or unorthodox sense.

This canon measurably assists our effort to ascribe meaning to the word "contribution." Contribution is a standard legal term that enjoys a stable, well-known denotation. It refers to a claim "by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make." *Akzo Coatings, Inc.* v. *Aigner Corp.,* —— F.3d ——, —— (7th Cir. 1994) [1994 U.S. App. LEXIS 17028 at *5]; *accord Northwest Airlines, Inc.* v. *Transport Workers Union,* 451 U.S. 77, 87-88 (1981); *In re "Agent Orange" Prod. Liab. Litig.,* 818 F.2d 204, 207 (2d Cir. 1987); *see also Black's Law Dictionary* 399 (6th ed. 1990) (de-

fining contribution as a right "of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear").[7] Accordingly, absent evidence that Congress had a different, more exotic definition in mind, we are inclined, in parsing 42 U.S.C. § 9613, to give the word "contribution" its generally accepted legal meaning.

The relevant external considerations counsel in favor of this usage and, thus, solidify our inclination. Perhaps most important, ascribing a traditional meaning to the term "contribution" fits both CERCLA's language and its structure. Under such a reading, the two statutes of limitations complement each other and together exhaust the types of actions that might be brought to recoup response costs: the shorter prescriptive period, contained in 42 U.S.C. § 9613(g)(3), governs actions brought by liable parties during or following a civil action under 42 U.S.C. §§ 9606-9607(a), while the longer statute of limitations, contained in 42 U.S.C. § 9613(g)(2), addresses actions brought by innocent parties that have undertaken cleanups (say, the federal, state or local government).[8]

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[7] Most states have adopted contribution provisions that operate along substantially similar lexicographical lines. *See Northwest Airlines*, 451 U.S. at 87 n.17 (collecting exemplars). This is an important datum because CERCLA's legislative history evinces an intent that courts establish the scope and nature of CERCLA liability consistent with evolving principles of law. *See, e.g.*, 126 Cong. Rec. 30,932 (1980) (statement of Sen. Randolph); 126 Cong. Rec. 31, 965 (1980) (statement of Rep. Florio).

[8] It is possible that, although falling outside the statutory parameters established for an express cause of action for contribution, *see* 42 U.S.C. § 9613(f)(1), a PRP who spontaneously initiates a cleanup without governmental prodding might be able to pursue an implied right of action for contribution under 42 U.S.C. § 9607(c). *See Key Tronic Corp.* v. *United States*, 114 S. Ct. 1960, 1966 (1994) (explaining that CERCLA now "expressly authorizes a cause of action for contribution in [§ 9613] and impliedly authorizes a similar and somewhat overlapping remedy in [§ 9607]"); *cf. In re Hemingway Transp., Inc.*, 993 F.2d 915, 931 (1st Cir.)

This reading fits especially well with the language of 42 U.S.C. § 9613(g)(2), which concerns actions for "recovery of the costs." That phrase, reiterative of the subsection heading "Actions for recovery of costs," suggests full recovery; and it is sensible to assume that Congress intended only innocent parties—not parties who were themselves liable—to be permitted to recoup the whole of their expenditures. By contrast, 42 U.S.C. § 9613(g)(3) allows a "non-innocent" party (*i.e.*, a party who himself is liable) only to seek recoupment of that portion of his expenditures which exceeds his *pro rata* share of the overall liability—in other words, to seek contribution rather than complete indemnity. The statutory language thus suggests that cost recovery and contribution actions are distinct and do not overlap.

The pre-SARA caselaw and SARA's legislative history dovetail to furnish strong support for imputing a traditional meaning to the term "contribution" as it appears in 42 U.S.C. § 9613. As originally written, CERCLA gave the EPA several remedial choices. For example, it could (1) clean up a contaminated site and then sue to recover its response costs, *see id.* § 9607(a)(4), (2) endeavor to compel a PRP to perform a cleanup by administrative order, or, if the PRP proved recalcitrant, by obtaining a judicial decree, *see id.* § 9606, or (3) negotiate a settlement, *see id.* § 9622. Despite this array of weapons, however, CERCLA was—and still is—silent as to the extent of a particular PRP's liability. Judges abhor

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(stating in dictum that "in the event the private-action plaintiff itself is potentially 'liable' to the EPA for response costs, and thus is akin to a joint 'tortfeasor,' section 9607(a)(4)(B) serves as the *pre-enforcement* analog to the 'impleader' contribution action permitted under section 9613(f)"), *cert. denied*, 114 S. Ct. 303 (1993). If, indeed, the law allows such an implied right of action for contribution to be maintained—a matter on which we take no view—it is unclear to us whether such a cause of action would be subject to the three-year or the six-year prescriptive period. Because this appeal does not pose that question, we leave it for another day.

vacuums; and the courts filled this lacuna in the statute, reading CERCLA as imposing joint and several liability on the part of all responsible parties to reimburse the government for cleanup expenses and to pay response costs. *See, e.g., In re Hemingway Transp., Inc.*, 993 F.2d 915, 921 (1st Cir.), *cert. denied*, 114 S. Ct. 303 (1993); *O'Neil* v. *Picillo*, 883 F.2d 176, 178 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

Notwithstanding the presumed existence of joint and several liability, there was much uncertainty prior to SARA's passage as to whether a responsible party could recover from other PRPs the portion of its cleanup costs that exceeded its *pro rata* share. *See, e.g., United States* v. *New Castle County*, 642 F. Supp. 1258, 1262 (D. Del. 1986) (noting uncertainty). Although most courts ultimately ruled that section 9607 conferred an implied right of action for contribution in favor of a PRP that paid more than its ratable share, *see, e.g., O'Neil*, 883 F.2d at 179; *Mardan Corp.* v. *C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986), the situation was clouded by the Court's refusal to imply rights of action under other statutes in the absence of an express direction from Congress, *see, eg., Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981) (declining to imply right of action for contribution under the antitrust laws); *Northwest Airlines*, 451 U.S. at 91-95 (finding no implied right to contribution under either the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964).

This background brings the origins of SARA into sharp focus. A principal goal of the new section 9613 was to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances." S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1985), *reprinted in* 2 *Legislative History of the Superfund Amendments and Reauthorization Act of 1986*, 636,

Sp. Print 101-120 (101st Cong., 2d Sess.) (1990); *see also* 131 Cong. Rec. 24,450 (1985) (statement of Sen. Stafford) (predicting that section 9613 would "remove[] any doubt as to the right of contribution"). Of paramount significance for present purposes is that Congress, in enacting SARA, sought to codify the case law, *see O'Neil,* 883 F.2d at 179—and the cases decided to that point, without exception, employed the legal term "contribution" in its traditional sense to cover an action by one liable party against another liable party. *See, e.g., Bulk Distrib. Ctrs., Inc.* v. *Monsanto Co.,* 589 F. Supp. 1437, 1442-44 (S.D. Fla. 1984); *Jones* v. *Inmont Corp.,* 584 F. Supp. 1425, 1428-29 (S.D. Ohio 1984).

Taken in the aggregate, this impressive collection of signposts—canons of construction, other CERCLA language, the statute's structure, the state of the case law antedating SARA's passage, and SARA's legislative history—point squarely to a conclusion that Congress used the word "contribution" in the conventional sense, and fully intended courts to give the word its customary meaning. The authorities so hold. *See Akzo Coatings,* —— F.3d at —— [1994 U.S. App. LEXIS 17028 at *7]; *Amoco Oil Co.* v. *Borden, Inc.,* 889 F.2d 664, 672 (5th Cir. 1989); *Avnet, Inc.* v. *Allied-Signal, Inc.,* 825 F. Supp. 1132, 1137-38 (D.R.I. 1992); *Transtech Indus., Inc.* v. *A & Z Septic Clean,* 798 F. Supp. 1079, 1086 (D.N.J. 1992), *appeal dism'd,* 5 F.3d 51 (3d Cir. 1993), *cert. denied,* 114 S. Ct. 2692 (1994); *see also Key Tronic Corp.* v. *United States,* 114 S. Ct. 1960, 1965-66 (1994) (observing that section 9613(f) expressly created a cause of action permitting a responsible party to seek contribution from other PRPs).

Applying this legal regime to the facts at hand, and bearing in mind that appellants are by their own admission liable parties, their claim against Browning must be classified as an action for contribution. Hence, unless the claim can otherwise be saved, it will fall prey to the three-year bar of 42 U.S.C. § 9613(g)(3).

B. *The Statutory Interface.*

Appellants argue that, notwithstanding section 9613 (f)(3), the broad, unqualified langlage to the effect that responsible parties shall be liable to "any other person," 42 U.S.C. § 9607(a)(4), provides an alternative avenue for the maintenance of their suit. If this is so, appellants add, the six-year statute of limitations found in section 9613(g)(2), pertaining to actions for "recovery of the costs referred to in [§] 9607" must govern in this instance.

At face value, this expansive reading of section 9607 is untenable; carried to its logical extreme, such a reading would completely swallow section 9613(g)(3)'s three-year statute of limitations associated with actions for contribution. Since courts must strive to give effect to each subsection contained in a statute, indeed, to give effect to each word and phrase, *see United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992); *United States* v. *Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985), we refuse to follow a course that ineluctably produces judicial nullification of an entire SARA subsection.

Recognizing this looming obstacle, appellants attempt to skirt it by lowering their sights and, thus, preserving some semblance of utility for 42 U.S.C. § 9613(g)(3). In this vein, they focus on the phrase "incurred by," as used in 42 U.S.C. § 9607(a), and asseverate, based on this language, that section 9607(a) only covers actions to recoup cleanup costs directly paid for (*i.e.*, "incurred") by a responsible party (what we have termed first-instance costs, *see supra* p. [3a]). If this construction were adopted, then an action for recoupment of sums paid by a responsible party to a government agency to compensate it, pursuant to a settlement or judgment, for the funds it expended in cleaning up a site (what we have termed reimbursed costs, *see supra* p. [3a]), would lie under section 9613(f), but not under section 9607(a). Hence, section 9613(g)(3) would retain some measure of vitality, for an action by a responsible party against other PRPs to

recover that portion of the reimbursed costs paid by the former in excess of its *pro rata* share would constitute a contribution claim, subject to the three-year prescriptive period.[9]

We are not persuaded by this sleight of hand. For one thing, appellants' reading depends on excerpting phrases from section 9607(a) without due regard for the statute's overall content. The full text of the relevant subsection, reproduced in the appendix *infra*, makes selected parties liable for "any other necessary costs of response incurred by any other person." This unqualifiedly broad language comfortably accommodates all response costs incurred by a private party, not just first-instance costs. In a nutshell, accepting appellants' position would require us to read section 9607's language ("any other necessary costs") as containing an implicit qualification: "except for monies paid to reimburse government entities' cleanup costs." There is simply no rhyme or reason for reading that condition into what appears on its face to be a straightforward statutory directive. *See, e.g., CIA* v. *Sims*, 471 U.S. 159, 169-70 (1985) (refusing to read limitations into broad and unconditional statutory language). Under the reading that we adopt, by contrast, the unqualified language "any other necessary costs" remains as Congress wrote it, that is, without qualification.[10] We think that this reading is preferable.

For another thing, appellants' tracing of the statutory interface is wholly dependent on an unusually cramped

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[9] As an example, appellants suggest that an attempt to recover some part of the $475,000 payment they made to compensate the EPA and Maine for the latters' cleanup expenditures would be subject to the three-year limitations period, while an attempt to recover a portion of the response costs ($13,000,000 to date) paid directly by appellants could be brought under section 9607(a) and come within the six-year limitations period.

[10] As discussed above, *see supra* p. [9a], 42 U.S.C. § 9613(f)(1) explicitly confirms the cause of action for contribution that is implicit in the language of § 9607(a).

reading of the term "contribution." Under appellants' theory, the term refers only to reimbursed costs. This artificial circumscription entirely omits from the sweep of section 9613 what might be called "traditional" contribution actions. We know of no other court that has given such an odd definition to the term "contribution" in this —or any other—context; and, though we recognize that we are not bound to interpret the word as it is defined by state law, *see* 42 U.S.C. § 9613(f)(1) (providing that claims for contribution "shall be governed by Federal law"), the responsibility to develop federal common law is not a license to override policy choices made by the Congress or to create newfangled definitions for no better reason than that they suit a party's convenience or strike a judge's fancy. The meaning to be attributed to terms governed by federal law must, at the very least, comport with the statutory scheme in which such terms appear, and, wherever possible, effectuate discernible congressional intent. Put bluntly, a court cannot rewrite a statute by the simple expedient of calling a camel a horse, overlooking obvious humps.

Appellants' suggested interpretation fails this commonsense test on two grounds. First, 42 U.S.C. § 9613 itself appears to reject any distinction for the purposes of contribution between first-instance costs and reimbursed costs. After all, subsection 9613(f)(3)(B) authorizes a party to seek contribution "for some or all of the response action or for some or all of the costs of such action . . ." The simple reading of this subsection is that the initial phrase refers to expenses incurred in the course of a liable party's direction of a site's cleanup while the second phrase refers to reimbursement of cleanup costs incurred under the government's hegemony.

The legislative history confirms this explanation. In formulating SARA, the Senate Committee on Environment and Public Works viewed what is now section 9613(f) as intended to permit an action for contribution

when a party believed that it had "assumed a share of the cleanup or cost that may be greater than its equitable share." S. Rep. No. 11, *supra*. By like token, the House Committee on Energy and Commerce stated that contribution could be had under section 9613(f) by parties "who settle for all or part of a cleanup or its costs . . ." H.R. Rep. No. 253, pt. 1, 99th Cong., 2d Sess. 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862. These statements show beyond serious question that the drafters intended contribution, as that term is used in section 9613, to cover parties' disproportionate payments of first-instance costs as well as parties' disproportionate payments of reimbursed costs.

Second, appellants' construction emasculates the contribution protection component of CERCLA's settlement framework. CERCLA seeks to provide EPA with the necessary tools to achieve prompt cleanups. *See United States* v. *Cannons Engineering Corp.*, 899 F.2d 79, 90-91 (1st Cir. 1990). One such tool is the ability to foster incentives for timely settlements. *See id.* To this end, 42 U.S.C. § 9613(f)(2) provides that a party who settles with the government "shall not be liable for claims for contribution regarding matters addressed in the settlement." Because only the amount of the settlement, not the *pro rata* share attributable to the settling party, is subtracted from the aggregate liability of the nonsettling parties, *see id.*, section 9613(f)(2) envisions that nonsettling parties may bear disproportionate liability. This paradigm is not a scrivener's accident. It "was designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle." *Cannons Engineering*, 899 F.2d at 92; *see also* H.R. Rep. No. 253, *supra*, 1986 U.S.C.C.A.N. at 2862.

This mechanism for encouraging settlement would be gutted were courts to share appellants' view of the contribution universe, for subsection 9613(f)(2) then would afford very little protection. Although the subsection still

would prevent a settlor from being sued by another responsible party claiming that the first settlor paid less than its ratable share *of the government's expenses* (what we have termed "reimbursed costs"), the statutory shield would not extend beyond that point. Most disturbingly, if a party's direct, first-instance payments are not grist for the contribution mill, but, instead, are to be treated as recovery costs within the purview of section 9607(a), a nonsettling or later-settling PRP would be entitled to bring an action against a responsible party who settled at the earliest practicable moment, but paid less than his ratable share of the aggregate first-instance payments. Exposing early settlors who make first-instance payments to later contribution actions not only would create a needless asymmetry in the treatment of first-instance costs as opposed to reimbursed costs, but also would greatly diminish the incentive for parties to reach early settlements with the government, thereby thwarting Congress's discernible intent.[11] This result makes little sense, and, therefore, we reject appellants' tortured construction of the statutory language.

III. CONCLUSION

The word "contribution" for purposes of 42 U.S.C. § 9613(f) should be given its plain meaning. Adapted to an environmental case, it refers to an action by a responsible party to recover from another responsible party that portion of its costs that are in excess of its *pro rata* share of the aggregate response costs (including both first-instance costs and reimbursed costs). Applying this definition, the instant action clearly qualifies as an action for contribution under section 9613(f)(1). And because CERCLA's text indicates that contribution and cost re-

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[11] It bears mention that CERCLA's contribution protection provisions also would be undermined if cost recovery actions were deemed to be overlapping with contribution actions.

covery actions are distinct, non-overlapping anodynes,[12] the action had to be commenced within three years of its accrual. *See* 42 U.S.C. § 9163(g)(3).

We need go no further. Appellants did not deign to sue until some five and one-half years after entry of the consent decree. Their suit is, therefore, time-barred.[13]

Affirmed.

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[12] Envisioning contribution and cost recovery actions as non-overlapping is perfectly consistent with the Court's recent determination that 42 U.S.C. §§ 9613 and 9707(a) create "similar and somewhat overlapping" actions for contribution. *Key Tronic*, 114 S. Ct. at 1966. The *Key Tronic* Court was discussing two different species of contribution actions and expressed no views anent the relation between contribution and cost recovery actions.

[13] The court below reached the same result based on somewhat different reasoning. While its rationale strikes us as problematic, we see little point in tilting at windmills. An appellate court is not chained to the lower court's reasoning, but may affirm the judgment below on any independently sufficient basis made manifest by the record. *See Garside* v. *Osco Drug, Inc.*, 895 F.2d 46, 49 (1st Cir. 1990); *Polyplastics, Inc.* v. *Transconex, Inc.*, 827 F.2d 859, 860-61 (1st Cir. 1987). Thus, we endorse the result reached below solely for the reasons stated herein.

APPENDIX

IV. STATUTORY APPENDIX

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

§ 9613. Civil proceedings

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection

shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal Law.

(g) Period in which action may be brought

(1) Actions for natural resources damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined

in section 9601(6) of this title, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Pritorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that

such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title

(relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 92-0206-B

UNITED TECHNOLOGIES CORPORATION, *et al.*,
Plaintiffs,

v.

BROWNING FERRIS IND., *et al.*,
Defendants.

ORDER AFFIRMING THE RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

On May 27, 1993, the United States Magistrate Judge issued his Recommended Decision regarding Defendants' Motions for Summary Judgment. Plaintiffs filed their Objection on June 14, 1993. Following a full briefing of the issues, the Court held a hearing on August 10, 1993. The Court has reviewed the Magistrate Judge's Recommended Decision, together with the entire record, and makes a *de novo* determination of all matters adjudicated by the Magistrate Judge. In accordance with *de novo* review, the Court *MODIFIES* the Magistrate Judge's discussion of the factual background and augments the Recommended Decision in light of the First Circuit's recent decision in *In re Hemingway Transport, Inc.*, 993 F.2d 915 (1st Cir. 1993).

Plaintiffs' Objection to the Recommended Decision notes two instances of possible error in the Recommended Decision's discussion of the factual background. For clarification purposes, the last sentence in the second paragraph on page 2 of the Recommended Decision should

be deleted and the first sentence of the paragraph should be modified to read as follows:

> On January 29, 1986, the United States filed a civil action under Sections 106 and 107 of CERCLA against Inmont Corporation ["INMONT"], the Town of Winthrop, Everett Savage and Glenda Savage entitled *United States v. Inmont Corp., et al.*, No. 86-0029-B (D. Maine).

Additionally, the first sentence in the second paragraph on page 3 of the Recommended Decision should be deleted and the following sentences should be inserted in lieu thereof:

> Plaintiff United Technologies Corporation acquired Inmont in 1979. It subsequently sold its Inmont stock to Plaintiff BASF Corporation in 1985. United Technologies Corporation and BASF Corporation filed this Complaint on October 16, 1992.

The Court notes the First Circuit's recent decision in *In re Hemingway* which addresses related CERCLA issues in the context of the bankruptcy code. The Court is saisfied that, while the First Circuit's opinion is not directly on point, it is consistent with the analysis in the Recommended Decision.

> [I]n the event the private-action plaintiff itself is potentially "liable" to the EPA for response costs, and thus is akin to a joint "tortfeasor," section 9607 (a)(4)(B) serves as the *pre-enforcement* analog to the "impleader" contribution action permitted under section 9613(f).

In re Hemingway, 993 F.2d at 931 (emphasis in original).

Accordingly, with the exception of the above modifications, the Court concurs with the recommendations of the United States Magistrate Judge for the reasons set forth in his Recommended Decision.

It is therefore *ORDERED* as follows:

(1) the Recommended Decision of the Magistrate Judge is *ADOPTED* as *MODIFIED.*

(2) the defendants' motions for summary judgment on Counts I, II and IV of the complaint are *GRANTED,* and the plaintiffs' pendent state law claims are *DISMISSED* without prejudice.

/s/ Morton A. Brody
MORTON A. BRODY
United States District Judge

Dated at Bangor, Maine this 11th day of August, 1993.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 92-0206-B

UNITED TECHNOLOGIES CORPORATION, *et al.*,
Plaintiffs

v.

BROWNING FERRIS IND., *et al.*,
Defendants

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [1]

This five-count Complaint alleges various causes of action under the Comprehensive Environmental Response, Compensation and Liability Act ["CERCLA"], 42 U.S.C. § 9601 *et seq.*, and state law. Defendants move for summary judgment on the grounds that the CERCLA claims are statutorily time-barred. The pendent state claims, they contend, must also be dismissed as no federal claims would remain to place jurisdiction in this Court.

Plaintiffs adopt Defendants' Statement of Material Facts for purposes of this Motion. They argue, however, that they are entitled to state causes of action under different sections of CERCLA, which provide different limitations periods. While conceding that their claim for contribution pursuant to CERCLA Section 113(g)(3),

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[1] Defendant Browning Ferris Industries filed its Motion for Summary Judgment on March 18, 1993. All other Defendants have since filed virtually identical motions, relying on the same arguments. For purposes of their resolution, they will be treated as one Motion for Summary Judgment.

Count IV of the Complaint, is barred by the applicable statute of limitations, they contend that their claims under Section 107(a)(4)(B), Counts I and II, are proper and timely and should be dismissed.

Discussion

Summary judgment is appropriate when the record reflects "no genuine issues as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). For purposes of this Motion for Summary Judgment, there are no genuine issue of material fact. The Court is left only to determine whether Defendants are entitled to judgment as a matter of law.

Undisputed Factual Background [2]

On January 29, 1986, the United States, filed a civil action under CERCLA against Inmont Corporation ["INMONT"], the Town of Winthrop, Everett Savage and Glenda Savage entitled *United States v. Inmont Corporation, et al.*, No. 86-0029-B (D. Maine). The complaint alleged that Inmont and the other defendants were jointly and severally liable under CERCLA for remedying the releases or threatened releases of hazardous substances at the Winthrop Landfill Superfund Site ["SITE"] in Winthrop. The complaint also alleged that Inmont and the other defendants were jointly and severally liable under CERCLA for the costs the United States had incurred and would continue to incur for actions taken in response to the release or threatened releases at the Site. This cause of action arose under Section 107(a)(4)(B), as do Plaintiffs' Counts I and II.

On February 4, 1986, the complaint was consolidated with a similar complaint regarding the Site filed by the State of Maine against the same defendants under CERCLA and state law entitled *State of Maine v. Inmont*

[2] This section is taken to no small extent from Defendant Browning Ferris Industries' Statement of Material Facts.

Corporation, et al., No. 86-0031-B (D. Maine). On March 23, 1986, the Court entered a consent decree ["DECREE"] in the consolidated cases. Specifically, the defendants agreed to undertake and complete work at the Site under the Decree and the Remedial Action Work Plan attached to the Decree. Inmont also agreed to pay, and has paid, the United States and the State of Maine for response costs that had been incurred by the United States and the State with respect to the Site prior to entry of the Decree.

Plaintiff United Technologies Corporation, parent corporation of Plaintiff BASF Corporation, and Plaintiff BASF, the successor of Inmont, filed this Complaint on October 16, 1992. They allege they have taken response actions at the Site and incurred response costs with respect to the Site in implementing the Decree. In Counts I and II, they seek to impose joint and several liability on these Defendants pursuant to the cost recovery and declaratory judgment provisions of Section 107(a)(4)(B). In Count IV, they sought contribution pursuant to Section 113(f), but now concede that their claim for contribution is subject to a three-year statute of limitations and is therefore time-barred.[3] The remaining issue is whether these Plaintiffs' sole remedy lies under Section 113; that is, whether despite Plaintiffs' chosen nomenclature, their claims in Counts I and II are really claims for contribution, and are therefore equally untimely.

Legal Analysis

Plaintiffs argue that their two remaining CERCLA claims are proper causes of action under Section 107.[4]

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[3] The applicable statute of limitations requires an action for contribution be brought within three years from the date of any consent decree. 42 U.S.C. § 9613(g)(3). The consent decree at issue in this case was entered on March 23, 1986.

[4] The applicable statute of limitations for Section 107 actions is found in Section 113, which reads in pertinent part as follows:

Specifically, they seek "recovery of costs" and request a declaratory judgment that Defendants are liable for any future costs which may be incurred. They rely on the provision within Section 107 which provides in pertinent part:

> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> . . .
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

42 U.S.C. § 9607(a).

Prior to the Superfund Amendment and Reauthorization Act ["SARA"] of 1986, there was no express provision allowing a party found to be liable for response costs to file a claim for contribution from other responsible parties. The difficulty with the lack of an express provision for contribution was that:

> a potentially liable party under section 107 faced the prospect of being singled out as a defendant in

---

> (2) Actions for recovery of costs
>
> An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—
>
> . . .
>
> (B) for a remedial action, within 6 years after initiation of phylsical on-site construction of the remedial action, . . .
>
> In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages.

42 U.S.C. § 9613(g).

> a government [section 107(a)(4)(a)] or private cost recovery action without any apparent means of fairly apportioning CERCLA costs awarded against it to other persons liable for these costs under the statute. The Courts responded to the inequity of this situation, and its negative implications for encouraging private parties to undertake voluntary CERCLA cleanups, by recognizing an implicit federal right to contribution under CERCLA. (citations omitted). Congress ratified these efforts in 1986 by amending CERCLA section 113 to expressly recognize a right of contribution under the statute.

County Line Inv. v. Tinney, 933 F.2d 1508, 1515-16 (10th Cir. 1991). The amendment provides that:

> [a] person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it *reduces the potential liability of the others by the amout of the settlement.*

42 U.S.C. § 9613(f)(2) (emphasis added). Further:

> [a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

42 U.S.C. § 9613(f)(3)(B).

Plaintiffs argue that the action for contribution cannot be their sole remedy, as they would lose the right to hold these Defendants jointly and severally liable, such liability being available only under Section 107. *Eg., United States v. Conservation Chemical*, 619 F. Supp. 162 (W.D. Mo. 1985). They argue that such a result would

leave the Government the only potential plaintiff under Section 107. We disagree with Plaintiffs' conclusion.[5]

The language of Section 113 clearly indicates that a party who has already settled the issue of its own liability with the Government, as is the case here, is thereafter limited in its own future recovery from other potentially responsible parties relative to rights available prior to the settlement under Section 107. Such an interpretation does not necessarily obliterate the private cost recovery action set forth in Section 107(a)(4)(B), which may yet be, perhaps appropriately, available to persons who voluntarily embark on a response plan without waiting for the Government to spur them into action. *Compare, Avnet, v. Allied-Signal,* No. 91-0383B, 1992 U.S. Dist. LEXIS 17009 (D.R.I. 1992) (suggesting, without deciding, that plaintiffs who incur response costs without waiting for government action may retain a right to recovery under Section 107(a)(4)(B))[6] *and United States v. Hardage,* 1989 Haz. Waste Litig. Rep. (Andrews) 18307, 18314 (Dec. 4, 1989) (noting that cost recovery actions provide incentives for "private parties to begin clean-up activities on their own") *and United States v. Kramer,* 757 F. Supp. 397, 416-17 (D.N.J. 1991) (section 107 actions are "an incentive for private parties to clean up hazardous waste sites, to risk their own capital initially, knowing that by then prevailing in a section 107 action, they will be reimbursed perhaps in excess of what might be shown in a section 113 action to have been their equitable share") *with Amoco Oil v. Borden,* 889 F.2d 664 (5th Cir. 1989) (action found to be one for contribution, despite no formal determination of plaintiff's liability).

---

[5] In so doing, we necessarily disagree as well with Defendants' assertion that contribution is the only private party action available under CERCLA.

[6] This Report and Recommendation of United States Magistrate Judge Timothy M. Boudewyne was adopted as to all substantive issues by the United States District Court. *Avnet v. Allied-Signal,* No. 91-0383B (D. R.I. October 30, 1992).

These Plaintiffs, however, did not incur costs of their own initiative. Rather, they waited until they were involved as defendants in litigation with both the United States and the State of Maine. In fact, some of the costs they wish to recover are payments made to cover costs incurred by the United States and the State. In our view, they are therefore confined to "seek[ing] contribution from any person who is not party to" their consent decree with the United States and the State of Maine. 42 U.S.C. § 9613(f)(3)(B).

In this case, Plaintiffs' liability has been resolved through the consent decree entered in this Court on March 26, 1986. Their sole recourse following that resolution was to bring an action under Section 113(g) for contribution from other potentially liable parties. They failed to do so within the statutory time period, and their claims are now barred.

Conclusion

Accordingly, I recommend that the Court *GRANT* Defendants' Motion for Summary Judgment on Count IV of Plaintiff's Complaint, as Plaintiffs concede it is barred by the applicable statute of limitations. I further recommend that the Court *GRANT* Defendants' Motion for Summary Judgment on Counts I and II of the Complaint, as these claims are necessarily claims for contribution, which are statutorily barred. Finally, I recommend Plaintiffs' pendent state law claims be *DISMISSED* without prejudice.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memoran-

dum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right of *de novo* review by the district court and to appeal the district court's order.

/s/ Eugene W. Beaulieu
EUGENE W. BEAULIEU
United States Magistrate Judge

Dated in Bangor, Maine on May 27, 1993.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 93-2253

UNITED TECHNOLOGIES CORPORATION, *et al.*,
Plaintiffs, Appellants,

v.

BROWNING-FERRIS INDUSTRIES, INC., *et al.*,
Defendants, Appellees.

ERRATA SHEET

The opinion of the court issued on August 19, 1994 is corrected as follows:

On page 4, last line—delete citation

On page 5, line 11—change "in March, 1986" to "no later than early 1987"

On page 5, lines 16, 17, 18—change sentence beginning with "Here, ..." to "Here, the court entered the consent decree in March of 1986 and remedial construction apparently started at the Site within one year of that event."

On page 19—line 13—change "five" to "six"

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2253

UNITED TECHNOLOGIES AND BASF CORPORATION,
Plaintiffs-Appellants,

v.

BROWNING-FERRIS INDUSTRIES, INC., *et al.*,
Defendants-Appellees.

BEFORE TORRUELLA, Chief Judge,
SELYA, CYR, BOUDIN AND STAHL, Circuit Judges

ORDER OF COURT

Entered: September 19, 1994

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:
/s/ Francis P. Scigliano
Clerk

APPENDIX F

STATUTORY PROVISIONS

42 U.S.C. § 9607 Liability
[CERCLA § 107]

* * * *

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of

a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, pipeline (as defined in the Hazardous Liquid Pipeline Safety Act of 1979 [49 U.S.C. 2001 et seq.]), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations;

or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels subject to the provisions of Title 33, 46, or 46 Appendix, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

* * * *

(e) Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

42 U.S.C. § 9622 Settlements
[CERCLA § 122]

* * * *

(d) Enforcement

(1) Cleanup agreements

(A) Consent decree

Whenever the President enters into an agreement under this section with any potentially responsible party with respect to remedial action under section 9606 of this title, following approval of the agreement by the Attorney General, except as otherwise provided in the case of certain administrative settlements referred to in subsection (g) of this section, the agreement shall be entered in the appropriate United States district court as a consent decree. The President need not make any finding regarding an imminent and substantial endangerment to the public health or the environment in connection with any such agreement or consent decree.

(B) Effect

The entry of any consent decree under this subsection shall not be construed to be an acknowledgment by the parties that the release or threatened release concerned constitutes an imminent and substantial endangerment to the public health or welfare or the environment.

Except as otherwise provided in the Federal Rules of Evidence, the participation by any party in the process under this section shall not be considered an admission of liability for any purpose, and the fact of such participation shall not be admissible in any judicial or administrative proceeding, including a subsequent proceeding under this section.

(C) Structure

The President may fashion a consent decree so that the entering of such decree and compliance with such decree or with any determination or agreement made pursuant to this section shall not be considered an admission of liability for any purpose.

(2) Public participation

(A) Filing of proposed judgment

At least 30 days before a final judgment is entered under paragraph (1), the proposed judgment shall be filed with the court.

(B) Opportunity for comment

The Attorney General shall provide an opportunity to persons who are not named as parties to the action to comment on the proposed judgment before its entry by the court as a final judgment. The Attorney General shall consider, and file with the court, any written comments, views, or allegations relating to the proposed judgment. The Attorney General may withdraw or withhold its consent to the proposed judgment if the comments, views, and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate.

(3) 9604(b) agreements

Whenever the President enters into an agreement under this section with any potentially responsible party with respect to action under section 9604(b) of this title, the President shall issue an order or enter into a decree setting forth the obligations of such party. The United States district court for the district in which the release or threatened release occurs may enforce such order or decree.

* * * *

(g) De minimis settlements

(1) Expedited final settlement

Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 9606 or 9607 of this title if such settlement involves only a minor portion of the response costs at the facility concerned and, in the judgment of the President, the conditions in either of the following subparagraph (A) or (B) are met:

(A) Both of the following are minimal in comparison to other hazardous substances at the facility:

(i) The amount of the hazardous substances contributed by that party to the facility.

(ii) The toxic or other hazardous effects of the substances contributed by that party to the facility.

(B) The potentially responsible party—

(i) is the owner of the real property on or in which the facility is located;

(ii) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(iii) did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission.

This subparagraph (B) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

(2) Covenant not to sue

The President may provide a covenant not to sue with respect to the facility concerned to any party who has entered into a settlement under this subsection unless such a covenant would be inconsistent with the public interest as determined under subsection (f) of this section.

(3) Expedited agreement

The President shall reach any such settlement or grant any such covenant not to sue as soon as possible after the President has available the information necessary to reach such a settlement or grant such a covenant.

(4) Consent decree or administrative order

A settlement under this subsection shall be entered as a consent decree or embodied in an administraitve order setting forth the terms of the settlement. In the case of any facility where the total response costs exceed $500,000 (excluding interest), if the settlement is embodied as an administrative

order, the order may be issued only with the prior written approval of the Attorney General. If the Attorney General or his designee has not approved or disapproved the order within 30 days of this referral, the order shall be deemed to be approved unless the Attorney General and the Administrator have agreed to extend the time. The district court for the district in which the release or threatened release occurs may enforce any such administrative order.

(5) Effect of agreement

A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(6) Settlements with other potentially responsible parties

Nothing in this subsection shall be construed to affect the authority of the President to reach settlements with other potentially responsible parties under this chapter.

(h) Cost recovery settlement authority

(1) Authority to settle

The head of any department or agency with authority to undertake a response action under this chapter pursuant to the national contingency plan may consider, compromise, and settle a claim under section 9607 of this title for costs incurred by the United States Government if the claim has not been referred to the Department of Justice for further

action. In the case of any facility where the total response costs exceed $500,000 (excluding interest), any claim referred to in the preceding sentence may be compromised and settled only with the prior written approval of the Attorney General.

(2) Use of arbitration

Arbitration in accordance with regulations promulgated under this subsection may be used as a method of settling claims of the United States where the total response costs for the facility concerned do not exceed $500,000 (excluding interest). After consultation with the Attorney General, the department or agency head may establish and publish regulations for the use of arbitration or settlement under this subsection.

(3) Recovery of claims

If any person fails to pay a claim that has been settled under this subsection, the department or agency head shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount of such claim, plus costs, attorneys' fees, and interest from the date of the settlement. In such an action, the terms of the settlement shall not be subject to review.

(4) Claims for contribution

A person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement shall not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

SUPREME COURT, U.S.
FILED
JAN 19 1995
OFFICE OF THE CLERK

No. 94-1079

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED TECHNOLOGIES CORPORATION and
BASF CORPORATION,

Petitioners,

vs.

BROWNING-FERRIS INDUSTRIES, INC., CARLETON WOOLEN MILLS, INC., CENTRAL MAINE POWER COMPANY, COMMUNITY SERVICE TELEPHONE COMPANY and PROGRESSIVE IRON WORKS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CARLETON WOOLEN MILLS, INC.

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether Petitioners' action to recover a share of the response costs incurred under a consent decree that resolved a common liability to the state and federal governments was an "action for contribution" and, thus, barred by the statute of limitations governing actions for contribution under § 113(g)(3)(B) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C., § 9613(g)(3)(B)?

STATEMENT UNDER RULE 29.1

In accordance with Rule 29.1 of the Rules of this Court, respondent Carleton Woolen Mills, Inc. states that it is a wholly-owned subsidiary of Allied Textile Companies, Public Limited Company, a United Kingdom company with shares traded on the London Stock Exchange. No subsidiary of Carleton Woolen Mills, Inc. has issued shares to the public.

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OTHER AUTHORITIES

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S. Rep. No. 349, 103d Cong., 2d Sess., and S. 1834 contained therein at pages 151 *et seq.* (1994) 5-7

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No. 94-1079

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

UNITED TECHNOLOGIES CORPORATION
and BASF CORPORATION,

Petitioners,

VS.

BROWNING-FERRIS INDUSTRIES, INC., CARLETON WOOLEN MILLS, INC., CENTRAL MAINE POWER COMPANY, COMMUNITY SERVICE TELEPHONE COMPANY and PROGRESSIVE IRON WORKS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT CARLETON WOOLEN MILLS, INC.

Respondent Carleton Woolen Mills, Inc. ("Carleton") joins in the Brief in Opposition submitted by Respondent Browning-Ferris Industries, Inc. The purpose of Carleton's Brief in Opposition is to address, pursuant to Rule 15 of this Court, specific perceived misstatements or omissions of fact and law in the Petition for a Writ of Certiorari (the "Petition")

and to submit certain supportive reasons for denying the Petition.

COUNTERSTATEMENT OF THE CASE

Carleton adopts the Counterstatement of the Case contained in the Brief in Opposition submitted by Browning-Ferris Industries, Inc., as supplemented below.

I. CORRECTION OF PERCEIVED MIS-STATEMENTS IN PETITIONERS' STATEMENT OF THE CASE

Under the heading "Factual Background" on pages 2 and 3 of their Statement of the Case, Petitioners omit several significant facts unfavorable to their later arguments:

A. Petitioners do not explain why they did not seek to have any of the Respondents designated as PRPs by the EPA during the period 1981 to March 1986 and took no action to seek a sharing or reimbursement of costs from the Respondents thereafter within the time allowed by CERCLA Section 113(g)(3). 42 U.S.C. § 9613(g)(3).

B. Petitioners fail to advise the Court that Inmont Corporation ("Inmont"), Petitioners' predecessor, did not enter into a voluntary settlement agreement or administrative consent decree, both of which were enforcement devices commonly used by the EPA during the period from 1981 to 1986, but waited over four years to resolve its liability by a judicial consent decree (the "Consent Decree") in a civil action in the

U.S. District, Court, District of Maine, in March 1986. JA, A-45.[1]

C. Petitioners do not state that the Consent Decree contained favorable terms negotiated by Inmont including provisions that it would be required to install a groundwater interceptor system and a groundwater treatment system only if an alternate concentration limit ("ACL") should be exceeded as established based on an ACL Demonstration to be made by Inmont within 365 days from the effective date of the Consent Decree. JA, A-85 and 105. This provision for an ACL Demonstration was negotiated before the adoption of § 121(d)(2)(ii) of CERCLA, 42 U.S.C. § 9621(d)(2)(ii), in October 1986 expressly authorizing ACLs as an alternative to treatment of contaminated groundwater to meet "background" levels or federal drinking water standards. Thus, Inmont negotiated a favorable arrangement in the Consent Decree, i.e., an opportunity to avoid costly interception and treatment of groundwater which was the EPA's usual remedy.

D. Petitioners suggest that they are fulfilling Inmont's obligations under the Consent Decree (Petition at 3). Petitioners do not disclose that they did not submit the ACL Demonstration within 365 days and, indeed, did not submit it until September, 1992. *See* Brief of Plaintiff-Appellants dated December 29, 1993 filed by Petitioners on appeal to the U.S. Court of Appeals for the First Circuit, page 11.

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[1] "JA" refers to the parties' Joint Appendix in the Court of Appeals, a copy of which is lodged with the Clerk of this Court.

E. Petitioners volunteer that remedial cost is expected eventually to total between thirty and forty million dollars (Petition at 3), but provide no basis for such estimate. They do not disclose how much of the cost resulted from the long delay in submission of the ACL Demonstration or why the ACL Demonstration failed after such a long time to persuade the EPA to excuse Petitioners from groundwater interception and treatment. Further, they offer no estimate of how much of the future cost is attributable to continuing dispersion of contamination throughout the soil and groundwater at the Winthrop Landfill during the years after 1981 when Inmont was first designated a PRP.

F. Petitioners do not disclose how their remedial actions at the Winthrop Landfill, including the installation of a landfill cap (JA, A-90 to A-96), may have commingled or eliminated evidence of contamination by Inmont and others, thus making it difficult and perhaps impossible to determine responsibility therefor.

II. CORRECTION OF PERCEIVED MISSTATEMENTS IN PETITIONERS' REASONS FOR GRANTING THE PETITION

Throughout their Reasons for Granting the Petition (Petition at 9 to 20), Petitioners seek repeatedly to enlist the sympathy of the Court by arguments based on erroneous facts and assumptions. They portray Inmont, themselves and other PRPs considering a consent decree to remediate hazardous waste facilities as needing powerful cost recovery incentives to cause them to undertake a cleanup, as though the decision were somehow voluntary.

Petitioners do not point out that Section 109 of CERCLA, 42 U.S.C. § 9609, contains civil penalty provisions which are powerful incentives. They do not state that court decisions imposing liability and penalties on stockholders, directors, officers, managers and successors have received wide publicity and are also powerful incentives. They do not state that, in the instant case, Inmont had the incentive of a favorable decree allowing it to present an ACL Demonstration so as to avoid pumping and treating the millions of gallons of hazardous substances for which it was designated as the sole generator PRP. *See* Consent Decree, JA, A-85 and A-105.

Petitioners argue that the decision of the Court of Appeals deprives PRPs seeking to recover response costs of the remedy of joint and several liability free of equitable and causation-related defenses (Petition at 19). These issues are not before the Court. However, in their argument, Petitioners are silent on the potential for PRPs performing cleanups to engage in conduct which could give them an unfair advantage in a long-belated allocation through removal or treatment of waste and alterations of a facility during remediation. Unjustified efforts by persons performing cleanups to shift their costs are well known. *See, e.g., B.F. Goodrich Co. v. Murtha*, 815 F. Supp. 539 (D. Conn. 1993); *later proceedings in the same case*, 840 F. Supp. 180 (D. Conn. 1994).

Petitioners' discussion of bills considered, but not adopted, during 1994 by Congress (Petition at pages 15 and 16) is deficient for two reasons. First, Petitioners fail to inform the Court that the bills, S. 1834, contained in S. Rep. No. 349, 103d Cong., 2d Sess. (1994), and H.R. 3800, contained in H.R. Rep. No. 582, 103d Cong., 2d Sess. (1994), if adopted, would have created fundamentally new methods for the identification of PRPs and the allocation of liability among them. Under the bills, the EPA would have identified PRPs found through its own investigation and through

information submitted by other persons including PRPs. After notice and other specified procedures, the EPA would then have issued a list of parties subject to the new allocation process. A new § 130(p)(3) of CERCLA would then have prohibited any action under § 107 or otherwise to seek contribution against any person not listed as an allocation party. S. Rep. No. 349 at 287 and H.R. Rep. No. 582 at 318. The bills would also have authorized the EPA to assign zero allocation shares, if appropriate, and to make *de minimis* settlements with allocation parties that would have barred contribution rights against them. Thus, the bills would have protected persons, such as the Respondents, who were not named as PRPs by the EPA, from long-belated lawsuits such as the instant case.[2]

Second, contrary to Petitioners' description, the proposed provisions of the bills changing the statute of limitations were indeed controversial once members of the Senate Committee on Environment and Public Works and other Senators and Representatives learned about them. During the drafting of the bills, S. 1834 and H.R. 3800, counsel for Petitioners served as counsel for an industry coalition which worked with other groups to propose the amendments. The proposed change of the statute of limitations was accomplished by an obscurely worded amendment that would have added a six-year period to the present three-year period by a cross-reference in § 113(g)(2)(C)(i) to § 113(g)(2)(A). S. Rep. No. 349 at 204, and H.R. Rep. No. 582 at 256. The change was described in the committee reports as a mere clarification with nothing to alert committee members of existing and pending litigation.

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[2] The bills would also have provided for funding of "orphan shares" up to $300 million per year from a trust fund to be created and maintained by excise taxes.

In September, 1994, several Senators and Representatives, including some who were serving as members of committees handling the bills, learned the significance of the change and took steps to implement corrective action. Because the final days of the Congressional term had been reached, the deadline set by the House Rules Committee for changes in H.R. 3800 passed before the Representatives could propose a change. However, Senator George Mitchell, a member of the Senate Committee on the Environment and Public Works, proposed a manager's amendment including, among other things, an amendment to § 113(g)(2) of S. 1834 providing that the change of the statute of limitations would apply after the date of enactment of the Superfund Reform Act of 1994. *See* 8 *Inside EPA's Superfund Report* 3, 34-38 (September 21, 1994). Thus, the amendment of the statute of limitations in S.1834 would not have applied to existing cases. Subsequently, neither S.1834 nor H.R. 3800 were sent to the floors of the Senate and House for adoption.

As described earlier, the new PRP identification and liability allocation methods in the bills made academic any useful function for a longer statute of limitations except to create an argument for Petitioners in the instant case.

REASONS FOR DENYING THE WRIT

Rule 14.1 of this Court requires that the questions presented in a petition for a writ of certiorari be short and concise and not argumentative. Petitioners' statement of the questions presented skews them in a manner which is highly argumentative.

Rule 10 of this Court sets forth examples of reasons that will be considered in determining whether to exercise its discretion to grant a writ of certiorari, none of which are present in the instant case:

(1) The decision of the Court of Appeals is not in conflict with any decision of this Court. Indeed, the Court of Appeals found in its opinion (page 16a, note 12) that its decision was consistent with this Court's decision in *Key Tronic Corp. v. United States*, 114 S. Ct. 1960 (1994). Once Petitioners' claim to recover response costs is determined to be for contribution, it is controlled by the language of 42 U.S.C. § 9613(g)(3) which clearly provides that no action for contribution for any response costs or damages may be commenced more than 3 years after the date of entry of a judicially approved settlement in any action under CERCLA for recovery of such costs or damages.

(2) There is no conflict among the United States courts of appeals. Indeed, the recent decision in *United States v. Colorado & Eastern Railroad Co.*, Nos. 93-1422, 94-1041, 1994 WESTLAW 647329 (10th Cir. Nov. 11, 1994)[3] is consistent with the decision of the Court of Appeals in the instant case insofar as it held that actions by PRPs to recover response costs from other PRPs are, regardless of the label used, actions for contribution. The other decisions by the United States courts of appeals cited by Petitioners did not consider and decide the issues presented in the instant case.

The decision of the Court of Appeals enhances the goals of CERCLA to encourage prompt and effective cleanups by requiring that contribution actions be commenced in a timely

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[3] LEXIS reports that the Court of Appeals withdrew its opinion on January 11, 1995.

manner. Thus, to the extent that such claims may be meritorious, the response costs recovered will become available at an earlier date to relieve the financial burdens of cleanups.

CONCLUSION

For the reasons stated in the Brief in Response of Browning-Ferris Industries, Inc. and herein, the Petition should be denied.

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January 19, 1995

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No. 94-1079

In The Supreme Court of the United States

October Term, 1994

United Technologies Corporation and
BASF Corporation,
Petitioners,

v.

Browning-Ferris Industries, Inc., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BFI'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' action to recover a share of the response costs incurred under a consent decree that resolved a common liability to the federal and state governments was an "action for contribution," and thus barred by the statute of limitations governing actions for contribution in § 113(g)(3)(B) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613(g)(3)(B).

STATEMENT REQUIRED BY RULE 29.1

Browning-Ferris Industries, Inc. ("BFI") is not a subsidiary of a publicly-held corporation. A subsidiary of BFI, Atwoods P.L.C., is a United Kingdom company with shares traded on the New York Stock Exchange and London Stock Exchange. No other subsidiary of BFI has issued shares to the public.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1079

UNITED TECHNOLOGIES CORPORATION AND BASF CORPORATION,

Petitioners,

v.

BROWNING-FERRIS INDUSTRIES, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BFI'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case presents the narrow question whether petitioners' claim is an action for "contribution." If so, it is barred by the statute of limitations in § 113(g)(3)(B) of CERCLA which expressly states that "*no action for contribution*" for "*any*" response costs may be brought more than three years after entry of consent decree regarding such costs. That narrow question does not present any issue that merits review by this Court.

Under a 1986 federal court consent decree, Inmont Corporation ("Inmont"), petitioners' predecessor, settled the claims of the federal and state governments concerning the Winthrop Landfill ("Site") and assumed in full a common liability to pay for and perform the govern-

ment-selected clean-up of the Site. Rather than file suit promptly, petitioners slept on their rights and waited six years to seek to recover the response costs they claimed exceeded their fair share of the total cleanup cost.

Applying basic canons of construction, the First Circuit reasonably and correctly found the petitioners' action was one "for contribution" and hence barred by § 113 (g)(3)(B). The unsurprising determination that petitioners' action is "for contribution" is consistent with decisions of other courts of appeals which agree that regardless of the statutory provision invoked, an action by one potentially responsible party ("PRP") against another PRP for cleanup costs incurred under a settlement with the government is "for contribution." Moreover, the decision is the first in which an appellate court has applied the plain language of § 113(g)(3)(B) to an action under CERCLA and hence does not present a conflict for review. In all events, the court's reasoning is sound and does not conflict with this Court's decision in *United States* v. *Key Tronic* or with any of the policies underlying CERCLA.

Factual Background—In 1985, the United States Environmental Protection Agency ("EPA"), having notified Inmont in 1982 that it considered Inmont liable under CERCLA (J.A. A-18), offered Inmont the opportunity to resolve its liability and assume responsibility for the cleanup.[1] Negotiations ensued, and Inmont and three other persons notified by EPA agreed to resolve the governments' claims concerning the Site in full in a Consent Decree. The Decree required Inmont to pay the government past response costs, future government costs, and other response costs by conducting EPA's cleanup. *Id.* at A-52-56. To lodge the Decree, the governments filed initial actions under CERCLA §§ 106 and 107 alleging Inmont and the other settlors were jointly and severally liable to remediate the Site and reimburse government response

[1] BFI has never been notified by EPA that it is a PRP.

costs. Upon entry of the Decree on March 23, 1986, petitioners assumed the common liability for the cleanup of the Site.

District Court Proceedings—In October 1992, six and one-half years after the Decree was entered, petitioners filed this suit. The complaint sought to recover from respondents a share of the response costs petitioners had paid and would pay pursuant to the Decree under both § 107 and § 113 of CERCLA.[2] Petitioners styled their § 107 action as "cost recovery" and their § 113 action as "contribution," although both sought to recover the same response costs. *Id.* at A-22, 24. BFI moved for summary judgment arguing petitioners' CERCLA action, whether styled under § 107 or § 113, was in fact simply an action "for contribution" and thus untimely under CERCLA § 113(g)(3)(B). BFI argued that like any "tortfeasor," petitioners had settled a common liability and were simply attempting to recover the costs associated with that settlement from other alleged joint tortfeasors.

The district court agreed. In an opinion written by the Magistrate Judge, and later adopted with limited changes by the District Judge, the court held, based on the plain language of § 113 and basic precepts of contribution, that petitioners' claims were "necessarily claims for contributions." Pet. App. 32a. Citing CERCLA § 113(f)(3)(B), the court reasoned that "a party who has already settled the issue of its own liability with the Government, as is the case here, is thereafter limited in its own future recovery from other potentially responsible parties . . ." *Id.* at 30a-31a.

First Circuit Decision—The First Circuit affirmed. The court held that "contribution" has its traditional meaning under CERCLA, and "refers to an action by a responsible party to recover from another responsible party that portion of its costs that are in excess of its *pro rata* share

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[2] The complaint also sought recovery under state law. Those claims are also pending in a state court action which is stayed.

of the aggregate response costs." *Id.* at 15a. The court based this ruling on the accepted canon of statutory construction that Congress intends a standard term such as "contribution" to have its customary legal meaning (*id.* at 6a), a conclusion confirmed by analysis of CERCLA's plain language and legislative history, and by relevant authorities. *Id.* at 10a. Applying the standard meaning of "contribution" to petitioners' action, the court found it was for contribution, and thus barred by § 113(g)(3).

In so holding, the Court rejected petitioners' theory that they had a separate action to recover the bulk of their response costs in a "cost recovery" action under CERCLA § 107. In order to preserve a role for § 113, petitioners argued Congress created a two-part scheme for recovery of response costs incurred by a private party: one action under § 107 for "cost recovery" to recoup response costs paid to *contractors* to perform an EPA-mandated cleanup, and a distinct action under § 113(f) "for contribution" *solely* for the response costs paid to *EPA*. *Id.* at 11a.[3] The court, however, rejected petitioners' theory as "sleight of hand," without basis in CERCLA or its legislative history, and an "artificial circumscription," contrary to the traditional view of contribution. *Id.* at 12a-13a. The court reasoned that CERCLA § 113(f)(3)(B) expressly authorizes a party who has settled with the government to seek contribution "for some or all of the *response action or* for some or all of the *costs of such action.*" 42 U.S.C. § 9613(f)(3)(B) (emphases added). The

[3] As the First Circuit observed, petitioners were forced to create their scheme solely to "preserv[e] some semblance of utility" for § 113. Pet. App. 11a. If § 107 were read to create a "broad, unqualified" right to recover all response costs, as petitioners argued to the district court, that action would "completely swallow" and subsume any contribution action and render § 113(f) and (g)(3) mere surplusage. *Id.* Relying on the well-established principle that "courts must strive to give effect to each subsection contained in a statute," the court "refuse[d] to follow a course that ineluctably produces judicial nullification of an entire SARA subsection." *Id.*

court concluded that this plain language, amplified by the legislative history, "show[s] beyond serious question that the drafters intended contribution, as that term is used in section 9613," to encompass the costs paid by private parties to perform cleanups. Pet. App. 14a.

Lastly, the court recognized that petitioners' "construction emasculates the contribution protection component of CERCLA's settlement framework." *Id.* As its name implies, "contribution protection" encourages private parties to settle with EPA by providing protection from suit by others and is one of the central tools CERCLA grants EPA to facilitate settlement. The court found this crucial mechanism "would be gutted" if private parties could simply avoid the protection by styling their action for cost recovery. *Id.* at 14a-15a.

REASONS FOR DENYING THE WRIT

The First Circuit's decision that petitioners' action is for "contribution" and hence barred by the express language of § 113(g)(3)(B) does not merit review. Every other appellate court which has considered the question has concluded that actions such as petitioners' are for contribution. In adding to this uniform body of law, the First Circuit soundly based its decision on basic canons of statutory construction, CERCLA's legislative history, and relevant authorities. Further, the First Circuit's decision to apply § 113(g)(3)(B) to petitioners' action also does not pose a conflict, as it is the first in which a court of appeals applied § 113(g)(3) to a CERCLA action. In any event, the court's reasoned interpretation of the plain language of § 113(g)(3)(B), which expressly governs *any* "action for contribution" for "*any* response costs" covered by a consent decree, is amply supported by the statute and contemporaneous legislative history.

Petitioners' attempt to create a conflict between the decision below and this Court's opinion in *Key Tronic* v. *United States*, which did not concern the statute of limita-

tions issue presented here, is baseless. Consistent with the First Circuit's analysis, this Court reasoned in *Key Tronic* that an action by a private party which had incurred cleanup costs under a settlement with the government would in any event be for "contribution."

Finally, petitioners' policy concerns do not justify review. As the First Circuit recognized, it is petitioners' "tortured construction" of CERCLA that would discourage cleanups and gut "contribution protection," the cornerstone of the settlement incentives Congress established in CERCLA. Pet. App. 14a-15a. In short, the policy arguments are an attempt to hide the self-inflicted wound at the core of this petition: petitioners' failure to file suit within three years.

I. THE FIRST CIRCUIT'S DECISION THAT PETITIONERS' ACTION WAS FOR CONTRIBUTION AND BARRED BY CERCLA § 113(g)(3)(B) DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS AND DOES NOT WARRANT REVIEW.

1. The First Circuit correctly held that petitioners' action was for contribution, and as the statute of limitations in § 113(g)(3)(B) unambiguously covers all actions for contribution for *any* response costs covered by a consent decree, petitioners' action was barred. The unsurprising holding that petitioners' action is for "contribution" does not conflict with a decision of any circuit court. The Fifth, Seventh, Ninth and Tenth Circuits have all considered whether an action such as petitioners' is "for contribution" and have uniformly agreed that it is. See *United States* v. *Colorado & E.R.R.*, No. 93-1422, 1994 WL 647329, at *5 (10th Cir. Nov. 17, 1994), *pet. for reh'g filed* (Dec. 12, 1994) ("whatever label" used, PRP who settled with EPA and financed and performed cleanup under settlement was limited to seeking contribution); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) (claim by PRPs who had performed the cleanup under an EPA settlement was "a quintessential

claim for contribution"); *In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir. 1991) (CERCLA action by one PRP against another was governed by the contribution provisions of § 113); *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989) (action by a PRP who had incurred costs to recover from another its equitable share of the costs was "for contribution"); see also *Smith Land & Improvement Corp.* v. *Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) (A PRP who settled with EPA may seek contribution for a share of the cleanup cost that exceeded its fair share.). Moreover, a number of district courts have similarly and persuasively reasoned that a PRP's action for response costs incurred performing a cleanup is for contribution.[4] Thus, contrary to petitioners' pleas, there is neither conflict nor "confusion" among the courts for this Court to resolve.

In fact, the First Circuit's determination concerning the nature of petitioners' action is entirely correct. Foremost, consistent with accepted canons of construction, the court found that Congress intended a standard term such as "contribution," not otherwise directly defined, to have its customary legal meaning. Pet. App. 6a. Relying on decisions of this Court and others, the First Circuit reasoned that contribution "refers to an action by a responsible party to recover from another responsible party that portion of its costs that are in excess of its *pro rata* share of the aggregate response costs." *Id.* at 8a, 15a; see

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[4] *United States* v. *Asarco, Inc.*, 814 F. Supp. 951, 956 (D. Colo. 1993); *Ciba-Geigy Corp.* v. *Sandoz Ltd.*, No. 92-4491, 1993 WL 668325, at *6-7 (D.N.J. June 17, 1993); *Avnet, Inc.* v. *Allied-Signal, Inc.*, 825 F. Supp. 1132, 1138 (D.R.I. 1992); *Transtech Indus.* v. *A & Z Septic Clean*, 798 F. Supp. 1079, 1086 (D.N.J. 1992), *appeal dismissed*, 5 F.3d 51 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 2692 (1994); *Ellman* v. *Woo*, 34 Envt. Rep. Cases (BNA) 1969, 1971 (E.D. Pa. 1991); *Versatile Metals, Inc.* v. *Union Corp.*, 693 F. Supp. 1563, 1571 (E.D. Pa. 1988); *Chemical Waste Management, Inc.* v. *Armstrong World Indus.*, 669 F. Supp. 1285, 1291 (E.D. Pa. 1987).

Northwest Airlines, Inc. v. *Transport Workers Union of Am.*, 451 U.S. 77, 87-88 (1981).[5] The First Circuit confirmed its interpretation of the term "contribution" in CERCLA by careful analysis of the statute, its legislative history, and relevant authorities. Pet. App. 7a-10a.

The plain language of CERCLA § 113 confirms the First Circuit's analysis. Section 113(f)(3)(B) expressly provides that an attempt to recover a share of a common CERCLA liability assumed in a settlement was for "contribution." 42 U.S.C. § 9613(f)(3)(B) ("A person who has *resolved its liability* to the United States . . . in an administrative or judicially approved *settlement* may seek *contribution*" from any non-settlor.) (emphasis added). This makes plain that a person who resolves its liability, without a finding of liability, would seek contribution.

The legislative history of the Superfund Amendments and Reauthorization Act of 1986 ("SARA") and pre-SARA caselaw relied on below likewise demonstrate that petitioners' action is for contribution. Prior to SARA, the right of responsible parties to seek contribution from other PRPs was uncertain. Pet. App. 9a; see *Key Tronic Corp.* v. *United States*, 114 S. Ct. 1960, 1965 (1994) (CERCLA originally "contained no express provision authorizing a private party that had incurred cleanup costs to seek contribution from other potentially responsible parties.").[6] Although courts generally found PRPs

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[5] As the First Circuit also noted, this description of a contribution action is recognized in most jurisdictions, *Northwest Airlines*, 451 U.S. at 87 n.17, and Congress directed the federal courts to establish the scope and nature of liability under CERCLA consistent with evolving principles of law. *See* 126 Cong. Rec. 30,932 (1980) (statement of Sen. Randolph); 126 Cong. Rec. 31,965 (1980) (statement of Rep. Florio); Pet. App. 7a n.7.

[6] Uncertainty prevailed, in part, because this Court had refused to imply rights of action under other statutes absent express direction from Congress. *Texas Indus.* v. *Radcliff Materials*, 451 U.S. 630, 638 (1981); 131 Cong. Rec. 24,450 (1985) (statement of Sen. Stafford, a sponsor of SARA).

who performed a cleanup had an implied right to contribution under CERCLA § 107, see *Key Tronic, supra*,[7] PRPs remained reluctant to clean up CERCLA sites voluntarily. Congress enacted § 113(f) to confirm that a private party performing an EPA cleanup could seek contribution from others. Congress believed this would encourage private parties to settle and perform cleanups. S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1985); H.R. Rep. No. 253, 99th Cong., 1st Sess. 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 (PRPs will be more willing to assume responsibility "for cleanup" if assured can seek "contribution" from others); H.R. Rep. No. 253(III), 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042 (describes contribution as "right available to those who have paid more than their equitable share of an entire liability").

In short, the uniform holdings of the courts of appeals, and the language and history of CERCLA, all confirm that petitioners' action is for contribution.

2. The First Circuit is the first court of appeals to apply § 113(g)(3)(B) directly to an action such as petitioners'.[8] As such, on that basis alone, there is clearly no conflict that warrants resolution by this Court.

In any case, the First Circuit correctly applied a reasonable and straightforward interpretation of CERCLA § 113(g)(3)(B) to find petitioners' contribution action

[7] No court found that a potentially responsible party who resolved its liability to the government and performed the cleanup then had an independent right to seek "cost recovery" and obtain a judgment of joint and several liability against another PRP. *E.g., United States* v. *Conservation Chem. Co.*, 619 F. Supp. 162, 229 (W.D. Mo. 1985). None of the cases cited by petitioners is to the contrary. Pet. 23.

[8] The only other appellate court to consider § 113(g)(3)'s applicability to contribution actions has noted that it would apply to an action like petitioners'. *Smith Land & Improvement Corp.* v. *Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

was barred. Pet. App. 4a-5a. CERCLA § 113(g)(3) provides:

> (3) Contribution—*No action for contribution for any response costs* or damages may be commenced more than 3 years after—
>
> (A) the date of judgment in any action under this Chapter for recovery of such costs or damages, or
>
> (B) the date of an administrative order under section 9622(g) (relating to de minimis settlements) or 9622(h) (relating to cost recovery settlements) or *entry of a judicially approved settlement with respect to such costs* or damages.

42 U.S.C. § 9613(g)(3) (emphases added).

The meaning of this provision is clear. Contrary to petitioners' claim, by use of the phrase "*no* action for contribution," § 113(g)(3)(B) plainly bars *any* action for contribution covered by a judicial consent decree. Further, it expressly covers *any* response costs covered by that decree. There is absolutely no basis for petitioners' faulty conclusion that § 113(g)(3)(B) only applies to actions to recover response costs "paid to EPA," as the statute does not make any such distinction. To the contrary, by its terms, § 113(g)(3)(B) applies, without exception, to *any* response costs covered by the judicial settlement, as the phrase "with respect to such costs" refers back to "any" response costs. The contemporaneous legislative history confirms this plain reading of § 113(g)(3). H.R. Rep. No. 962, 99th Cong., 2d Sess. 223 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3316 (House Conference Report).[9]

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[9] Petitioners' reliance on the proposed Superfund bill that did not pass the last Congress is misplaced. Pet. 15. The bill they cite never even went to the floor for debate or to conference. The problem with placing any weight upon such a bill is well illustrated by the fact that former Senate Majority Leader Mitchell, a member

In sum, CERCLA § 113(g)(3) is clearly the applicable statute of limitations for petitioners' action for contribution for response costs covered by a judicial consent decree.

3. In response to the First Circuit's reasoned analysis, petitioners again advance the same misguided theory, twice rejected below, that their claim is not for contribution because "contribution" serves the limited purpose of allowing a private party to recover response costs paid to EPA. Pet. 22-23. Petitioners renew this wholly artificial theory because otherwise, if responsible parties who settled a common liability to EPA had an unfettered right to seek "cost recovery" for any response costs under § 107(a), CERCLA § 113(f) and (g)(3) would be mere surplusage. Pet. App. 11a.[10] Yet, CERCLA and its legislative history reject petitioners' cramped understanding of contribution. As the First Circuit found, neither CERCLA § 107 nor the traditional meaning of "contribution" support the theory. *Id.* at 12a-13a. Moreover, § 113(f)(3)(B) is to the contrary.

> A person who has resolved its liability to the United States or the State *for some or all of a response action or for some or all of the costs of such action* in an administrative or judicially approved settlement may seek *contribution* from any other person who is not a party to the settlement . . . .

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of the Senate Environment and Public Works Committee, and a key draftsman of SARA, had proposed numerous amendments to the bill. Among the many amendments he proposed was to confirm that any revisions to § 113(g) would change current law and be applied prospectively only. *See* 8 *Superfund Report* 3, 34-38 (Sept. 21, 1994) (Text of Sen. Mitchell's proposed amendments included proposal to "clarify that the revised statute of limitations provided in the bill apply prospectively only.").

[10] Petitioners created this theory out of whole cloth. Their complaint made no distinction between response costs paid to the government and costs paid to perform cleanup work. J.A. A-22, 24.

42 U.S.C. § 9613(f)(3)(B) (emphases added).[11] This statutory language, on its face, unambiguously demonstrates that Congress intended an action for "contribution" would encompass *both* costs paid directly to the government *and* costs paid by a person who assumed responsibility to perform a cleanup. Pet. App. 13a.

The legislative history confirms this reading of § 113(f)(3)(B). Both Senate and House committees stated that § 113(f) was designed to allow an action for contribution when a person "believes that it has assumed *a share of the cleanup* or cost that may be greater than its equitable share under the circumstances." S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1985) (emphasis added); see H.R. Rep. No. 253, 99th Cong., 1st Sess. 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 ("Parties who settle for all or part of a cleanup or its costs . . . can attempt to recover some portion of their expenses and obligations in contribution litigation from parties who were not sued in the enforcement action or who were not parties to the settlement."). As the First Circuit held, "[t]hese statements show beyond serious question" that Congress intended contribution would include an action to recover costs paid to perform a cleanup, not just costs paid to EPA. Pet. App. 14a.

II. PETITIONERS' ATTEMPT TO MANUFACTURE A CONFLICT BETWEEN THE JUDGMENT OF THE COURT OF APPEALS AND THIS COURT'S DECISION IN *KEY TRONIC* IS WITHOUT MERIT.

Lacking any split in the circuits, petitioners seek to manufacture a conflict between the judgment below and this Court's opinion in *Key Tronic* v. *United States*, 114 S. Ct. 1960 (1994). This argument is baseless. Peti-

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[11] Other provisions of CERCLA confirm this reading. For example, the definition of "response costs" does not distinguish between costs based on to whom the costs are paid. 42 U.S.C. § 9601(23)-(25).

tioners focus on dicta [12] in *Key Tronic* that states, as a result of SARA, CERCLA "expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107." 114 S. Ct. at 1966. Petitioners then claim the First Circuit's decision conflicts with that phrase because the court below allegedly found PRPs have no cause of action "under § 107."

Petitioners' argument is a red herring. Contrary to petitioners' blanket assertion, the First Circuit did not find a responsible party could never bring an "action under § 107." The decision below states that in view of the Court's statements in *Key Tronic* an implied right of action for contribution may exist for private parties under CERCLA § 107. Pet. App. 7a n.8; 12a n.10, 16a n.12. What the First Circuit did find was that actions for "contribution and cost recovery are distinct." *Id.* at 15a-16a. It then correctly found that in this case, where the costs were incurred under a consent decree that resolved a common liability to the governments, petitioners' action was for "contribution" and *not* a "cost recovery" claim under § 107. *Id.*[13] As such, the First Circuit concluded, its analysis was consistent with *Key Tronic*'s discussion of "two different species of contribution actions." *Id.* at 16a n.12.

In any event, read in context, *Key Tronic* makes plain that the only "somewhat overlapping" remedy that possibly persists in § 107 is for contribution. *Key Tronic* reasoned that an implied right of contribution survived

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[12] The narrow question presented to the Court in *Key Tronic* was whether attorney's fees incurred outside a settlement were necessary costs of response under CERCLA. 114 S. Ct. at 1963. The Court discussed different actions under CERCLA, but did not consider whether the *Key Tronic* petitioners' action was for "contribution" within the meaning of § 113(g)(3)(B).

[13] Conversely, in *Key Tronic*, the attorney's fees at issue were "incurred before the settlements" and were not part of the common liability assumed in settlements with EPA. 114 S. Ct. at 1963.

SARA because prior to SARA the lower courts had found CERCLA § 107 "to impliedly authorize *such* a cause of action," for contribution under § 107. 114 S. Ct. at 1965 (emphasis added). In SARA, the Court explained, Congress then created an express cause of action for contribution in § 113, but also "appeared to endorse" the decisions pre-supposing the implied right of contribution under § 107. *Id.*[14] Accordingly, at most *Key Tronic* suggests petitioners might conceivably have had an implied action for "contribution" under § 107. But even if that were the case, under the plain language of § 113 (g)(3) such an action would be barred. In any case, because neither the First Circuit nor any other court has ever considered what statute of limitations should apply to that implied contribution action, that issue is not before, and certainly does not merit review by, this Court.[15]

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[14] The majority and dissent debated whether the claim for contribution was express or implied. *E.g.*, 114 S. Ct. at 1966 n.11 ("That § 107 imposes liability on A for costs incurred 'by any other person' *implies* . . . that A may have a claim *for contribution* against those treated as joint tortfeasors.") (emphasis partially supplied). That debate is not implicated here, however, as in either case, petitioners' claim is still for contribution.

[15] Petitioners' further assertion that the First Circuit opinion produces a "result that cannot be reconciled" with the decisions of other courts is equally baseless, as the cited decisions neither decided whether a claim by a person who had resolved a common liability to the government was for contribution nor interpreted CERCLA § 113(g)(3)(B). *See Velsicol Chem. Corp.* v. *Enenco, Inc.*, 9 F.3d 524 (6th Cir. 1993) (whether the action was for contribution was not at issue); *General Elec. Co.* v. *Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1417-18 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991) (issue was whether defendant could assert unclean hands defense); *In re Charter Co.*, 862 F.2d 1500, 1503 (11th Cir. 1989) (court did not decide whether costs to perform cleanup where recoverable because none were at issue).

III. PETITIONERS' POLICY REASONS FOR GRANTING REVIEW ARE GROUNDLESS. ON THE CONTRARY, IT IS PETITIONERS' VIEW OF THE STATUTE THAT WOULD FRUSTRATE THE WILL OF CONGRESS.

Lacking a split in the circuits upon which to base their petition, petitioners sprinkle their petition with sweeping statements concerning CERCLA policy, principally asserting the decision will discourage privately funded cleanups. Yet, as the First Circuit explicitly recognized, it is petitioners' view of CERCLA that would discourage private party settlements.

1. Foremost, petitioners' "construction emasculates the contribution protection component of CERCLA's settlement framework" afforded settling parties by CERCLA §§ 113(f)(2) and 122(g)(5). Pet. App. 14a. Without that protection, private parties would have far less incentive to settle promptly and agree to undertake an EPA-selected cleanup.

As the opinion below explained, CERCLA first and foremost seeks to provide EPA with the tools it needs to achieve prompt cleanups. *Id.* (citing *United States* v. *Cannons Eng'g Corp.*, 899 F.2d 79, 90-91 (1st Cir. 1990)). As the cornerstone of EPA's settlement incentives, Congress enacted "contribution protection" under §§ 113(f)(2) and 122(g) of CERCLA. *Id.; Cannons*, 899 F.2d at 92. Under these sections, to induce PRPs to settle with the government, a PRP who settles with the government "shall not be liable for claims *for contribution* regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2) (emphasis added), and § 9622 (g)(5) (*de minimis* settlements). This "was designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle." Pet. App. 14a (citing *Cannons,* 899 F.2d at 92); H.R. Rep. No. 253, 99th Cong., 1st Sess. 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862.

Yet, if petitioners' view of CERCLA were adopted, then the explicit protection afforded PRPs from claims "for contribution" in §§ 113(f) and 122(g) "would be gutted." Pet. App. 14a. PRPs who incurred cleanup costs could simply bring actions against settling parties, style them as § 107 "cost recovery" actions and thereby circumvent contribution protection.[16] The result of these actions would be to "diminish the incentive for parties to reach early settlements with the government" and increase litigation, clearly contrary to Congress's stated statutory goals. *Id.* at 15a; 42 U.S.C. § 9622. As such, petitioners' "tortured construction" of CERCLA was properly rejected below.

2. Petitioners' dramatic assertions that cleanups will be discouraged are simply without merit. Persons who have agreed to perform cleanups will remain obligated to do so. The decision has no effect on those commitments. All the decision means is that those who have settled with EPA or the State will have to file any actions for contribution within three years of settlement, or risk forfeiting their claim.

Moreover, the longer statute of limitations advocated by petitioners will merely serve to extend the already lengthy CERCLA litigation process and deprive parties of reasonable repose. Congress stated a clear preference to bring all private parties into a matter early and for CERCLA actions to be brought promptly to avoid the problems associated with delay, rather than allowing the evidence to grow stale, as petitioners did in this matter. See H.R. Rep. No. 253, 99th Cong., 1st Sess. 80 (1985), *reprinted in* U.S.C.C.A.N. 2835, 2862; S. Rep. No. 11, 99th Cong., 1st Sess. 55 (1985).

Nor will a settlor be disadvantaged if it may not seek "cost recovery." Petitioners' argument is based on a false

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[16] For example, EPA may settle with one group of PRPs to perform part of a cleanup, and then bring suit against another group to perform the rest. Under petitioners' theory, the second group could bring a cost recovery action against the settlors.

premise: that "[s]ection 107(a) cost recovery [acts as] the primary incentive" to encourage PRPs to agree to undertake cleanups. Pet. 12. That is simply not true. If that were the case, cleanups would have abounded before SARA and there would have been no reason for Congress to enact the contribution framework in § 113 in the first place. Yet, as the legislative history makes plain, Congress enacted § 113 because PRPs were *not* settling and to assure that PRPs who agreed to perform the cleanup would be entitled to contribution and protected from future suits.

Moreover, a contribution action among PRPs presents none of the disadvantages asserted by petitioners. To the contrary, liability remains strict, subject to the same limited defenses. The four categories of liable parties under CERCLA are set forth in § 107(a)(1)-(4), and regardless whether the action is for contribution or cost recovery, § 107 will determine who is liable. 42 U.S.C. § 9613(f)(1) (may seek contribution from a person liable "under section 9607(a)"). Then, in a contribution action, as CERCLA § 113(f) explicitly provides, a district court has extremely broad discretion to allocate responsibility among all liable parties on a case-by-case basis, including the so-called "orphan share." *Id.* (court may allocate response costs "using such equitable factors as the Court determines appropriate"); see H.R. Rep. No. 253(III), 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3041-42 (resolve contribution equitably, on "case-by-case basis"); S. Rep. No. 11, 99th Cong., 1st Sess. 54 (1985).[17] Indeed, early cooperation with the government will not be discouraged, as that is one of the factors courts typically consider. See H.R.

[17] Courts agree the discretion to allocate responsibility among PRPs is broad. *E.g., Environmental Transp. Sys., Inc.* v. *Ensco, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992); *United States* v. *R.W. Meyer, Inc.*, 932 F.2d 568, 572 (6th Cir. 1991); *see also United States* v. *Stringfellow*, No. 83-2501, 1993 U.S. Dist. LEXIS 19113, at *6 (C.D. Cal. Nov. 30, 1993) (allocating orphan share).

Rep. No. 253 (III), 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042; 126 Cong. Rec. 26,781 (1980) (statement of Sen. Gore). In short, after settlement of the government's claims, a court would allocate liability among liable parties on an equitable basis —unless, as was the case here, the contribution plaintiffs failed to bring their actions within three years of settlement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED TECHNOLOGIES CORPORATION AND
BASF CORPORATION,
Petitioners,

v.

BROWNING-FERRIS INDUSTRIES, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

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1. Respondents' briefs in opposition fail to come to grips with the central issue decided by the court of appeals. Instead, respondents attempt to divert attention from that issue, and from the reasons warranting review, by focusing entirely on whether or not petitioners' action is properly characterized as one for contribution. But that question is not dispositive, is not the basis for the court of appeals' decision, and is quite different from either of the questions for which review is sought in the petition.

The court of appeals held that petitioners have no right of action under CERCLA Section 107(a) because, as PRPs who settled with the government, their sole remedy under CERCLA is an action for contribution under Sec-

tion 113(f). This holding is the linchpin of the court of appeals' decision. The court did not decide, as respondents would have it, that, even if petitioners could proceed under Section 107(a), they would still be bound by the three-year limitations period in Section 113(g)(3). Such a holding would be incorrect, and independently might warrant review here, but it is not the holding of the court of appeals. Rather, the court below resolved this case on a much more fundamental basis, namely, that PRPs are simply not entitled to proceed under Section 107(a). Pet. App. 15a-16a and n.12.

This holding is in direct conflict with the decision of this Court in *Key Tronic Corp. v. United States*, 114 S. Ct. 1960 (1994), and likewise is at odds with decisions in other circuits, which have granted Section 107(a) relief to PRPs under similar circumstances. Pet. 16-18. Respondents simply refuse to address *this* conflict, arguing instead that there is no conflict on the question that *they* prefer to discuss, namely, the different issue of whether petitioners' action should be classified as an action for contribution. Respondents' extended dissertation on that point cannot detract from the importance of the question actually decided by the court of appeals and cannot hide or eliminate the conflict in the interpretation of Section 107(a) that this Court should resolve.

2. At stake in this case are the rights of numerous PRPs that have entered settlements and many more PRPs that must evaluate whether settlement is a feasible option for them in light of the rule announced by the court of appeals. Respondents do not dispute the far-reaching implications of the decision below. Rather, they urge the Court to disregard the actual ruling of the court of appeals, and to focus instead on whether petitioners' claim is one for contribution, without regard for the statutory source of petitioners' rights.

Putting aside the fact that the position urged by respondents is not the one adopted by the court of appeals,

respondents' argument fails to address petitioners' point that the six-year limitations period of Section 113(g)(2) expressly applies to actions under Section 107(a), whether or not those actions are described as claims for contribution. Pet. 20-21. Not only do respondents fail to deal with the express language of Section 113(g)(2), but they also fail to explain how petitioners' claim in this action, even if labeled "contribution," falls within the language of Section 113(g)(3).

Respondents attempt to convey the impression that Section 113(g)(3) covers all CERCLA contribution actions, ignoring the rather obvious fact that the express language of the statute cannot support such a broad construction. For example, as the petition explains (Pet. 22), "contribution" claims for response costs incurred by PRPs that do not settle but are the subjects of mandatory Section 106 cleanup orders plainly do not fit under any of the proceedings enumerated in Section 113(g)(3), and Section 113(g)(3) therefore cannot provide the limitations period for such claims.[1]

Respondents attempt to derive support from the introductory text of Section 113(g)(3), which refers to "any" response costs being sought in a CERCLA contribution

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[1] PRPs that receive Section 106 administrative orders illustrate the flaws in the court of appeals' decision in another way as well. PRPs that abide by such orders and conduct cleanups have not entered into any administrative or judicially approved settlement with the United States, nor have they been parties to any civil action under Section 106 or Section 107(a). Accordingly, if such PRPs wish to assert a claim to recover an appropriate share of their response costs from other PRPs, they will be unable to assert any cause of action under Section 113(f) because they will not fit within any of the categories of actions authorized in that provision. Their sole recourse will be an action to recover response costs under Section 107(a). Under the court of appeals' decision in this case, however, such an action would be barred because of the claimant's status as a "non-innocent" PRP. Nothing in CERCLA or SARA suggests that Congress intended to impose such harsh consequences on a party that complies with a Section 106 order.

action. BFI Br. in Op. 10. But this treats as insignificant the remaining language of the provision, which expressly limits the kinds of contribution actions covered by the section. With regard to an action for contribution for response costs covered by "a judicially approved settlement," the statute says that the three-year period applies only "with respect to such [response] costs" set forth in the settlement. The only response costs in this case covered by that language are the $475,000 in payments to the government, which are not at issue here. The response costs petitioners seek here were not liquidated in the settlement but stem from an agreement to clean up the site. The only costs that the consent decree expressly required petitioners to pay were the costs that the federal and state government already had incurred. Beyond those costs, the decree did not obligate petitioners to pay or incur any specified amount of response costs, and it therefore cannot be said that the settlement was "with respect to" the costs that petitioners themselves later incurred.[2]

3. Significantly, respondents make no attempt to defend the court of appeals' determination that cost recovery actions under Section 107(a) and contribution actions under Section 113(f) "are distinct, non-overlapping anodynes" (Pet. App. 16a) and that PRPs may pursue the latter but not the former. Respondents instead cite extensively to Section 113(f)(3)(B), which provides that

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[2] Respondents' reliance on *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988), is misplaced for several reasons. BFI Br. in Opp. 9 n.8. First, *Smith Land*, unlike this case, was a straightforward contribution action and did not involve a claim under Section 107(a) or a dispute about the availability of such a claim. Moreover, that case did not apply any statute of limitations, but simply acknowledged that Section 113(g) provided a potential defense in a contribution action. Finally, the only court of appeals, other than the First Circuit in this case, that has actually *applied* a statute of limitations to a PRP's action for response costs under Section 107(a) applied Section 113(g)(2). *Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524, 529-30 (6th Cir. 1993).

a "person who has resolved its liability to the United States . . . *may* seek contribution" from non-settling PRPs. 42 U.S.C. § 9613(f)(3)(B) (emphasis added). BFI Br. in Opp. 3, 4, 8, 11-12. This section, added in SARA, does not help respondents. By using the word "may," Congress intended to confer a right of action, but nowhere did Congress say or intimate that PRPs may not proceed under Section 107(a) or that Section 113(f) provides the exclusive remedy for a settling PRP. *Charter Township of Oshtemo v. Am. Cyanamid Co.*, No. 1:92:CV:843, 1993 U.S. Dist. LEXIS 13176, at *4 (W.D. Mich. Aug. 19, 1993); *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F. Supp. 1100, 1118 (N.D. Ill. 1988).

The legislative history of the 1986 amendments to CERCLA cited by respondents shows that Congress intended to *broaden* rights available to private parties to encourage settlements and private-party cleanups. BFI Br. in Opp. 9. When it enacted those amendments, Congress made clear that the right of action granted under Section 107(a) would remain available "[n]otwithstanding any other provision or rule of law . . . ." Respondents cite no authority for the proposition that, by enacting Section 113(f), Congress intended to cut back on rights that CERCLA otherwise extends to PRPs. To the contrary, *Key Tronic* recognizes that Congress had no such intention when it enacted SARA. 114 S. Ct. at 1966.[3]

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[3] Respondents take comfort in observing that no pre-SARA court granted a PRP's claim for recovery of response costs under Section 107(a). BFI Br. in Opp. 9 n.7. That is hardly remarkable, given that no court was asked to decide the issue under facts similar to those presented here. Following enactment of SARA, however, several courts have addressed the issue and have decided that a settling PRP is entitled to recover response costs in an action under Section 107. *See, e.g., United States v. SCA Serv. of Indiana, Inc.*, 849 F. Supp. 1264, 1283 (N.D. Ill. 1994); *Barton Solvents, Inc. v. Southwest Petro-Chem., Inc.*, 38 E.R.C. 1022, 1027 (D. Kan. 1993); *Charter Township of Oshtemo v. Am. Cyanamid Co., et al.*, No. 1:92:CV:843, 1993 U.S. Dist. LEXIS 13176 (W.D. Mich. Aug. 19, 1993).

In a vain attempt to distinguish the relevant facts of this case from the situation considered in *Key Tronic*, respondents observe that the petitioner there incurred response costs *before* it settled with the government. BFI Br. in Opp. 13 n.13. That factual difference is without legal significance. Nothing in *Key Tronic* remotely suggests that the existence of a right of action under Section 107(a) turns on whether response costs are incurred before or after a settlement is concluded.

4. Respondents contend that the contribution protection provided by CERCLA Sections 113(f)(2) and 122(g) would be threatened if petitioners' claims were characterized as anything other than "contribution." BFI Br. in Opp. 15-16. This argument is a red herring, for several reasons.

First, of course, contribution protection has never been at issue in *this* case; none of the respondents has entered a settlement, and therefore none of the respondents can claim any entitlement to contribution protection. It was Inmont (which had been acquired by petitioner UTC and was later sold to petitioner BASF) that settled with the government, not any of the respondents.

Second, as demonstrated above and in the petition, labelling petitioners' action an action for contribution is by no means fatal to petitioners' position. Section 113(g)(3), by its very terms, applies only to those contribution actions specifically enumerated in the statute, and petitioners' claim to recover their response costs does not fall within any of the enumerated categories. Thus, if, as respondents contend, actions like petitioners' must be classified as actions for contribution so as to protect previously settling parties, the actions can be so classified, the statutory protection can be preserved, and petitioners' claim still would not be covered by the three-year limitations period in Section 113(g)(3). Respondents do not suggest that settlement protection would be impaired in any way merely by application of the six-year limitations period in Seciton 113(g)(2).

Third, if petitioners are correct in their alternative contention that their Section 107(a) claim for response costs is not properly characterized as a contribution action at all (and that therefore the three-year limitations period of Section 113(g)(3) never even comes into play) (*see* Pet. 22-24), it simply does not follow that settling parties would have no protection against Section 107(a) cost recovery claims by other PRPs. Courts that have been asked to protect settling parties from claims that clearly do not qualify as claims for contribution under Section 113(f) but that could lead to similar kinds of recovery (*e.g.*, claims of indemnity, quantum meruit, or unjust enrichment) have readily concluded that the statutory protection should extend to such claims. *E.g., United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990) (providing settlement protection for state indemnity claims not covered under CERCLA); *United States v. Pretty Prod., Inc.*, 780 F. Supp. 1488, 1495-97 (S.D. Ohio 1991). Nothing in Section 113(f)(2) or Section 122(g)(5) is to the contrary. Because of the strong federal interest in promoting settlements, courts have even extended protection to parties that have entered into private settlements, which are not covered at all under CERCLA Sections 113(f)(2) or 122(g). *E.g., Barton Solvents, Inc. v. Southwest Petro-Chem., Inc.*, 834 F. Supp. 342, 346 (D. Kan. 1993); *Am. Cyanamid Co. v. King Indus., Inc.*, 814 F. Supp. 215, 218 (D.R.I. 1993).

Finally, respondents' attempt to use contribution protection, which was designed to encourage settlements with the government, as a shield to enable them to avoid claims by parties that actually *did* settle with the government puts a perverse twist on the statute's objectives. Indeed, this very argument was rejected by the only other court to decide the statute of limitations issue presented in this case. *United States v. SCA Serv. of Indiana, Inc.*, 849 F. Supp. 1264, 1284 (N.D. Ind. 1994) (applying six-year limitations period to settling PRPs' claims to recover response costs).

5. Two final points warrant brief comment.[4] First, respondents repeatedly portray petitioners as "liable parties" who discharged a "common liability" shared jointly by petitioners and respondents. *E.g.*, BFI Br. in Opp. i, 3, 8, 11, 13, 14 n.15. They do not dispute, however, that petitioners have not admitted liability and, in particular, did not admit liability prior to entry of the consent decree. Pet. 3, 8. Respondents' failure to contest this point highlights the error in the court of appeals' opinion. Defining contribution as "a claim 'by and between jointly and severally liable parties' " (Pet. App. 6a), the court of appeals, laboring under the mistaken belief that "appellants are by their own admission liable parties," concluded that petitioners' claim "must be classified as an action for contribution." Pet. App. 10a. Review is warranted to eliminate the confusion that the court's error will spawn in the development of CERCLA case law. *E.g., United States v. SCA Serv. of Indiana, Inc.*, 865 F. Supp. 533, 545 (N.D. Ill. 1994) (distinguishing the holding in this case on the basis of alleged admission of liability).

Finally, respondents suggest that the legislative process is unlikely to address the issues presented by this case. BFI Br. in Opp. 10-11 n.9; CWM Br. in Opp. 7. They do not dispute petitioners' point that the changes to the limitations provisions proposed in the last Congress were designed to achieve the original intent of SARA. Moreover, respondents' argument only strengthens the reasons for reviewing the decision below. With numerous PRPs attempting to determine what their rights would be under CERCLA if they were to agree to clean up contaminated sites, review by this Court would ensure that CERCLA's

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[4] The brief in opposition of respondent Carleton Woolen Mills, Inc. ("CWM") merits little discussion, except to say that the assertions made by CWM have no bearing on the questions presented by the petition. CWM's submission appears to be concerned with questions surrounding the allocation of response costs or the recoverability of specific costs, neither of which is at issue here.

goals are fulfilled and give much-needed guidance on the statute's remedies and limitations provisions.

For these reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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